Mahmood bin Ooyub v Li Chee Loong and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02 (NCVC)(W)-463–03 OF 2018, J-02(NCVC)(W)-1603–08 OF 2018 AND J-02(NCVC)(W)-2049–10 OF 2018
KAMARDIN HASHIM, SURAYA OTHMAN AND LEE SWEE SENG JJCA
19 JUNE 2020

Moneylenders — Moneylending transaction — Sale and purchase of property — Lenders of interest-bearing loans required borrowers to sign away their landed properties as collateral vide sale and purchase agreements ('SPAs') and related documents — Whether the SPAs were a sham to disguise illegal moneylending transactions to circumvent the strict provisions of the Moneylenders Act 1951 ('the MA') — Whether the SPAs were null and void and unenforceable both under the MA as well as s 24 of the Contracts Act 1950 — Whether all transfers of borrowers' properties into the names of the lenders pursuant to the SPAs were void and defeasible — Whether court would not entertain any claim by lenders for restitution of monies loaned under illegal moneylending transactions as such transactions were void ab initio

The appellants in the three appeals herein were property owners who had used their properties as collateral to borrow loans from individuals. In each case, the loans were secured against sale and purchase agreements ('SPAs') of the properties concerned and the appellants also had to sign in blank the Form 14A memorandum of transfer ('MOT') under the National Land Code and deposit their title deeds to the properties with the solicitors acting for the lenders. In each case, when the appellants could no longer pay the exorbitant interest rates charged on the loans, the lenders commissioned the SPAs and MOTs to wrest away the properties of the appellants. In all the three appeals, the appellants met their respective respondents for the first time when the suits between them came up for trial in the High Court. In all the three cases, the High Court gave full effect to the SPAs, MOTs and other related documents to dismiss the claims of the appellants and rule in favour of the 'purchasers/lenders'. The instant appeals were against the decisions of the High Court.

Appeal No 463:

To secure a loan of RM250,000 from an individual named Ponytail Lee the appellant attended the office of a lawyer acting for the lender and signed several documents in blank — which he later discovered to be a SPA and a MOT — and deposited the issue document of title ('IDT') to his single-storey bungalow with the said lawyer. After finding that he could no longer continue making the heavy interest repayments on the loan and fearing that he might lose his property, the appellant lodged a police report and entered a private caveat on

his land. In due course, the appellant was sued by one Li Chee Loong ('LCL'), whom claimed to be the purchaser under the SPA and who sought specific performance of the SPA and the removal of the appellant's caveat plus damages arising from its lodgement. The appellant counterclaimed for a declaration that the SPA and related documents were a sham to disguise an illegal moneylending transaction which was null and void and unenforceable. He also sought the return of the IDT to his property. The High Court allowed LCL's claim and dismissed the appellant's counterclaim.

Appeal No 1603:

The appellant ('TBE') sued one Lim Len Tat ('LLT') and the same solicitors who had acted for the lender in Appeal No 463 for an order setting aside the transfer of his house to LLT and for the property to be registered back in his name and for the IDT to the property to be returned to him. TBE's case was that the purported SPA and related documents he had signed in blank at the said solicitor's office to secure a RM100,000 loan from a person named 'Lee' were a sham to disguise an illegal moneylending transaction which was null and void and unenforceable. The High Court dismissed TBE's claim and allowed LLT's claim for vacant possession of the property.

Appeal No 2049:

The appellants sued the same respondents as in Appeal No 1603 to set aside the transfer of their single-storey terrace house to LLT on the ground that it was unlawful and fraudulent and pursuant to an illegal moneylending transaction. They sought an order that they be reinstated as the registered owners of the property and that the IDT to the same be returned to them. Finding nothing amiss with the SPA and related documents that the appellants had signed at the lender's solicitor's office to secure a RM150,000 loan from a person named 'Marcus', the High Court dismissed the appellants' claim and allowed LLT's application to remove the first appellant's private caveat on the land. The appellants were also ordered to pay damages to LLT for loss of use of the property.

Held, unanimously setting aside the decisions of the High Court in the three appeals herein, allowing the claims/counterclaims of the appellants, declaring the SPAs in the three appeals to be null and void and unenforceable and: (a) in Appeal No 463, ordering the caveat lodged by the respondent to be removed; and (b) in Appeal Nos 1603 and 2049, setting aside the transfer of the respective properties to LLT and ordering that the appellants concerned be reinstated as the registered owners of their respective properties with vacant possession:

(1) The transactions in the three appeals herein were illegal moneylending transactions disguised as sale and purchase transactions (see para 270).

(2) Whenever it was alleged that an agreement before the court was a sham and a fabrication with the object of circumventing the law, it behooved the court to examine the external evidence to see if the pieces of the puzzle

formed a coherent whole. The court had to probe further to see if there were unusual features in the agreement and examine the circumstantial evidence, such as the conduct of the parties, that might arouse suspicion (see para 211).

(3) In scrutinising the transaction, the court was duty-bound to shine the search-light of consistency and coherence and to see if there were contradictions that cried out for an explanation. No one factor was conclusive, but if when taken together there were more questions raised than there were satisfying answers, then in all probability the agreement was a sham and fabrication to camouflage the real transaction which, if allowed to prevail, would contravene the law (see paras 214–215).

(4) The unusual features, suspicious circumstances, anomalies and aberrations in the instant three appeals, when taken together, strongly negated the existence of any genuine SPA in each case and showed that the agreements and related documents in each case were all a sham to distract and deceive the enforcement authority and the appellants. In each case, on balance of probabilities, the true transaction was an illegal moneylending transaction (see paras 60–61 & 216).

(5) The trial judges in the instant cases had misconstrued ss 91 and 92 of the Evidence Act 1950 as prohibiting evidence to be given that contradicted the express terms of the respective SPAs. The trial judges erred in feeling constrained to give effect to the terms of the SPAs and the related documents. The rule against parole evidence in ss 91 and 92 was not applicable when the allegation was that the agreement relied upon was a façade or a sham (see paras 221 & 224).

(6) In the instant appeals, the respondents, LCL and LLT, were unlicensed moneylenders which rendered the agreements in the respective SPAs unenforceable vide s 15 of the Moneylenders Act 1951 ('the MA'). From the evidence adduced, the borrowers had proved that the interest charged had been exorbitant. Under s 10OA of the MA, even a single loan at interest was enough to raise the presumption that the lender was carrying on the business of moneylending. The evidence showed that LCL and LLT had been unlicensed moneylenders not only in the instant appeals but in other cases as well. They had thus failed to rebut the presumption that they were carrying on the business of moneylending (see paras 227–228 & 230–233).

(7) The device of using a sale and purchase agreement and a memorandum of transfer to secure the grant of a loan with interest to circumvent the provisions of the Moneylenders Act 1951 was clearly void both under that Act as well as s 24 of the Contracts Act 1950. Any transfer that arose from such a void transaction was equally void and defeasible (see paras 235, 237–238 & 252–253).

(8) The court could not allow any claim for restitution under an illegal moneylending transaction. For one thing, the agreements were void ab initio. They did not become void subsequently nor were they discovered to be void. Hence, s 66 of the Contracts Act 1950 had no application. To allow the lenders to claim back their principal loan would stultify the public policy behind the Moneylenders Act 1951 and negate all efforts put in place by Parliament to contain the menace of illegal moneylending (see paras 260, 265 & 268).

[Bahasa Malaysia summary

Perayu dalam tiga rayuan di sini adalah pemilik harta tanah yang telah menggunakan harta tanah mereka sebagai jaminan untuk membuat pinjaman dari seorang individu. Berdasarkan setiap kes tersebut, pinjaman dijamin dengan perjanjian jual beli ('SPA') hartanah berkenaan dan perayu juga perlu menandatangani borang kosong memorandum pindahmilik 14A ('MOT') di bawah Kanun Tanah Negara dan menyerahkan geran hak milik mereka terhadap hartanah tersebut kepada peguamcara pemberi pinjaman. Berdasarkan setiap kes, ketika perayu tidak lagi dapat membayar faedah yang tinggi yang dikenakan terhadap pinjaman, pemberi pinjaman melengkapkan SPA dan MOT bagi melepaskan hartanah perayu. Dalam ketiga-tiga rayuan tersebut, pihak perayu bertemu dengan responden masing-masing untuk pertama kalinya apabila tuntutan saman di antara mereka dibicarakan di Mahkamah Tinggi. Dalam ketiga-tiga kes tersebut, Mahkamah Tinggi memberikan kesan penuh terhadap SPA, MOT dan dokumen lain yang berkaitan untuk menolak tuntutan pihak perayu dan memutuskan dengan memihak kepada 'pembeli/pemberi pinjaman'. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Rayuan No 463:

Untuk mendapatkan pinjaman berjumlah RM250,000 daripada individu bernama Ponytail Lee, perayu menghadiri pejabat peguam yang bertindak bagi pemberi pinjaman dan menandatangani beberapa dokumen kosong — yang kemudiannya beliau ketahui sebagai SPA dan MOT — dan menyimpan dokumen hak milik ('IDT') untuk banglo satu tingkat milik beliau kepada peguam tersebut. Apabila mendapati bahawa beliau tidak lagi dapat terus membuat pembayaran faedah yang tinggi dari pinjaman tersebut dan bimbang bahawa beliau akan kehilangan hartanya, perayu membuat laporan polis dan memasukkan kaveat persendirian pada hartanahnya. Pada masa yang sama, perayu disaman oleh seorang Li Chee Loong ('LCL'), yang mengaku sebagai pembeli di bawah SPA dan memohon perlaksanaan spesifik SPA tersebut dan pembatalan kaveat perayu serta ganti rugi yang timbul darinya. Perayu membuat tuntutan balas suatu deklarasi bahawa SPA dan dokumen-dokumen yang berkaitan adalah palsu untuk menyamar sebagai transaksi pinjaman wang haram yang tidak sah dan terbatal dan tidak dapat dilaksanakan. Beliau juga memohon pengembalian IDTh hartanahnya. Mahkamah Tinggi membenarkan tuntutan LCL dan menolak tuntutan balas perayu.

Rayuan No 1603:
Perayu ('TBE') menyaman seorang Lim Len Tat ('LLT') dan peguam yang sama yang mewakili pemberi pinjaman dalam Rayuan No 463 untuk suatu perintah bagi mengetepikan pindahmilik rumahnya kepada LLT dan untuk hartanah tersebut didaftarkan semula atas namanya dan agar IDT hartanah tersebut dikembalikan kepadanya. Kes TBE adalah kononnya SPA dan dokumen-dokumen berkaitan yang beliau telah tandatangani kosong di pejabat peguam tersebut untuk mendapatkan pinjaman RM100,000 dari orang bernama 'Lee' adalah penipuan untuk menyamar transaksi pinjaman wang haram yang batal dan tidak sah serta tidak dapat dilaksanakan. Mahkamah Tinggi menolak tuntutan TBE dan membenarkan tuntutan LLT untuk hak milikan kosong hartanah tersebut.

Rayuan No 2049:
Perayu menyaman responden yang sama seperti dalam Rayuan No 1603 untuk mengetepikan pindahmilik rumah teres satu tingkat mereka kepada LLT dengan alasan bahawa ianya adalah tidak sah dan dengan cara penipuan dan berdasarkan urus niaga pinjaman wang haram. Mereka memohon perintah agar mereka dikembalikan sebagai pemilik hartanah yang didaftarkan dan IDT dikembalikan kepada mereka. Membuat dapatan bahawa tidak ada apa yang tidak kena dengan SPA dan dokumen-dokumen berkaitan yang telah ditandatangani oleh perayu di pejabat peguam pemberi pinjaman untuk mendapatkan pinjaman RM150,000 daripada seorang bernama 'Marcus', Mahkamah Tinggi menolak tuntutan perayu dan membenarkan permohonan LLT untuk membatalkan kaveat persendirian yang didaftarkan oleh perayu pertama pada hartanah tersebut. Perayu juga diperintahkan untuk membayar ganti rugi kepada LLT kerana kerugian penggunaan hartanah.

Diputuskan, dengan sebulat suara mengetepikan keputusan Mahkamah Tinggi dalam ketiga-tiga rayuan di sini, membenarkan tuntutan/tuntutan balas pihak perayu, mengisytiharkan SPA dalam ketiga-tiga rayuan tersebut adalah terbatal dan tidak sah dan tidak dapat dilaksanakan dan: (a) dalam Rayuan No 463, memerintahkan kaveat yang didaftarkan oleh responden dibatalkan, dan (b) dalam Rayuan No 1603 dan 2049, mengetepikan pindahmilik hartanah masing-masing ke LLT dan memerintahkan agar perayu yang berkaitan dikembalikan semula sebagai pemilik berdaftar hartanah masing-masing dengan milikan kosong:

(1) Transaksi dalam tiga rayuan di sini adalah transaksi pinjaman wang haram yang menyamar sebagai transaksi jual beli (lihat perenggan 270).

(2) Setiap kali didakwa bahawa perjanjian di hadapan mahkamah adalah penipuan dan fabrikasi dengan tujuan untuk menghindari undang-undang, mahkamah harus memeriksa bukti luar untuk melihat sama ada persoalan membentuk keseluruhan yang konsisten. Mahkamah harus menyelidik dengan lebih jauh untuk melihat sama ada wujud ciri-ciri yang tidak biasa dalam perjanjian dan memeriksa bukti-bukti

yang tidak langsung, seperti tingkah laku pihak-pihak, yang dapat menimbulkan kecurigaan (lihat perenggan 211).

(3) Dalam meneliti transaksi tersebut, mahkamah mempunyai tanggungjawab untuk memberikan pencerahan secara konsisten dan koheren dan untuk melihat sama wujud percanggahan yang memerlukan penjelasan. Tidak ada satu pun faktor yang meyakinkan, tetapi sekiranya disatukan wujud lebih banyak pertanyaan yang dibangkitkan daripada jawaban yang memuaskan, maka berdasarkan kebarangkalian perjanjian tersebut adalah palsu dan fabirkasi untuk menyamar transaksi sebenar yang, sekiranya dibenarkan, bertentangan dengan undang-undang (lihat perenggan 214–215).

(4) Ciri-ciri luar biasa, keadaan yang mencurigakan, anomali dan penyimpangan dalam tiga rayuan semasa, apabila dilihat secara bersama, dengan kuat bertentangan terhadap kewujudan SPA yang sah dalam setiap kes dan menunjukkan bahawa perjanjian dan dokumen yang berkaitan dalam setiap kes itu adalah palsu untuk mengalihkan perhatian dan menipu pihak berkuasa dan perayu. Dalam setiap kes, berdasarkan kimbangan kebarangkalian, transaksi sebenarnya adalah transaksi pinjaman wang haram (lihat perenggan 60–61 & 216).

(5) Hakim perbicaraan dalam kes-kes semasa secara salah mengguna pakai ss 91 dan 92 dari Akta Keterangan 1950 sebagai keterangan bercanggah untuk diberikan yang bertentangan dengan syarat-syarat yang jelas setiap SPA. Hakim perbicaraan terkhilaf kerana terpaksa memberika kesan terma SPA dan dokumen yang berkaitan. Peraturan terhadap bukti parol dalam ss 91 dan 92 tidak boleh diguna pakai apabila dakwaan bahawa perjanjian tersebut adalah penipuan atau palsu (lihat perenggan 221 & 224).

(6) Dalam rayuan semasa, responden, LCL dan LLT, adalah pemberi pinjaman wang tidak berlesen yang membuat perjanjian dalam SPA masing-masing tidak dapat dilaksanakan berdasarkan s 15 Akta Pemberi Pinjam Wang 1951 ('APPW'). Dari keterangan yang dikemukakan, peminjam telah membuktikan bahawa faedah yang dikenakan adalah terlalu tinggi. Di bawah s 10OA APPW, bahkan satu pinjaman dengan faedah sudah cukup untuk membangkitkan anggapan bahawa pemberi pinjaman menjalankan perniagaan pinjaman wang. Bukti menunjukkan bahawa LCL dan LLT adalah pemberi pinjaman wang tidak berlesen bukan sahaja dalam rayuan semasa tetapi juga dalam kes lain. Oleh itu, mereka gagal menolak anggapan bahawa mereka menjalankan perniagaan pinjaman wang (lihat perenggan 227–228 & 230–233).

(7) Alat yang menggunakan perjanjian jual beli dan memorandum pindahmilik untuk menjamin pemberian pinjaman dengan faedah untuk menghindari peruntukan Akta Pemberi Pinjam Wang 1951

adalah jelas terbatal masing-masing di bawah Akta tersebut dan juga s 24 Akta Kontrak 1950. Sebarang pindahmilik yang berlaku daripada urus niaga tidak sah tersebut sama terbatal dan tidak dapat dilaksanakan (lihat perenggan 235, 237–238 & 252–253).

(8) Mahkamah tidak dapat membenarkan tuntutan restitusi di bawah transaksi pinjaman wang haram. Untuk satu perkara, perjanjian tersebut tidak lagi sah. Ianya tidak menjadi batal dan juga didapati tidak sah. Oleh itu, s 66 Akta Kontrak 1950 tidak boleh diguna pakai. Untuk membenarkan pemberi pinjaman menuntut balik pinjaman utama mereka, adalah bertentangan dengan kepentingan awam di sebalik Akta Pemberi Pinjam Wang 1951 dan menolak semua usaha yang dilakukan oleh Parlimen untuk membendung ancaman pinjaman wang secara haram (lihat perenggan 260, 265 & 268).]

Cases referred to

Arnold v National Westminster Bank plc [1991] 2 AC 93, HL (refd)

Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors [2013] 10 MLJ 1; [2013] 5 CLJ 488, HC (refd)

Boissevain v Weil [1950] AC 327, HL (refd)

Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2), Rayner and Keeler Ltd v Courts [1967] 1 AC 853, HL (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Dadourian Group International Inc and others v Simms and others [2009] EWCA Civ 169, CA (refd)

Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] MLJU 1552, CA (refd)

Gangabai w/o Rambilas Gilda v Chhabubai w/o Pukharajji Gandhi AIR 1982 SC 20, SC (refd)

Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 MLJ 333, CA (refd)

Hitch and others v Stone (Inspector of Taxes) [2001] STC 214, CA (refd)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (refd)

Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2) [2005] 3 SLR 157; [2005] 3 SLR(R) 157, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)

Mood Music Publishing Co Ltd v De Wolfe Publishing Ltd [1976] Ch 119, CA (refd)

Ngai Fong Lan (P) & Anor v Li Chee Loong [2018] MLJU 1518, HC (refd)

Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another [2018] 1 SLR 363; [2018] SGCA 5, CA (refd)

Pannir Selvam a/l Sinnaiyah & Anor v Tan Chia Foo & Ors [2019] MLJU 1699, HC (refd)
Patel v Mirza [2017] AC 467, SC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Snook v London and West Riding Investments Ltd [1967] 2 QB 786, CA (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)
Tong Lee Hua v Lee Yoke San [1981] 1 MLJ 54, PC (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24, FC (refd)
Yee Poh Nyen v Raji bin Kasan & Ors [2018] MLJU 1108, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Contracts Act 1950 ss 24, 24(a), (b), (c), (e), 66
Defences (Finance) Regulations 1939 [UK]
Evidence Act 1950 ss 15, 91, 92
Moneylenders Act 1951 ss 2, 5, 5(1), 10OA, 10P, 15, 17A(1), 29AA(1), 29B(1), (5)
National Land Code ss 340(1), (2), (2)(b), Forms 14A, 19B
Stamp Act 1949

Appeal from: Civil Suit Nos 23(NCVC)-9–02 of 2015, JA-22NCVC-2–01 of 2017 and JA-24NCVC-220–04 of 2016 (High Court, Johor Bahru)

Chang Tau Sian (Henry Soong & Chang) in Civil Appeal No J-02(NCVC)(W)-463–03 of 2018 for the appellant.
GK Sritharan (GK Sritharan & Co) in Civil Appeal No J-02(NCVC)(W)-1603–08 of 2018 for the appellant.
G Ravi and Aida Hasan (G Ravi) in Civil Appeal No J-02(NCVC)(W)-2049–10 of 2018 for the appellant.
Lim Chon Sin (Lim Wong & Partners) in Civil Appeal No J-02(NCVC)(W)-463–03 of 2018 for the respondent.
David Leow (Tng, Liew, David Leow & Co) in Civil Appeal Nos J-02(NCVC)(W)-1603–08 of 2018 and J-02(NCVC)(W)-2049–10 of 2018 for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] It is not always easy to discern and distinguish the real from the fake, the genuine from the sham. It is often a world of genuine imitation that we find ourselves to be in. It is no different in the seedy world of illegal moneylending or 'along' as is our local parlance for it. Human nature being what it is, we are not far from the days of *The Merchant of Venice*, where Shylock demanded his

pound of flesh! If at all, the subterfuge and chicanery have become more sophisticated.

[2] Granted there would be those cases where the transactions are genuine as reflected in the documents and then one party tries to resile from it and alleges it is illegal moneylending. Then on the opposite side would be cases where the moneylending transaction is dressed like an innocuous sale and purchase transaction where it is argued that the court should not go beyond its four walls for otherwise no transaction would be certain.

[3] The court would always, in cases of this nature, have to tread cautiously where one side alleges a clandestine operation camouflaged as a conveyance of property and the other cries foul! The court would look for suspicious circumstances or unusual features that tend to lend support to the colourable actions. The task is made more difficult because more often than not, the one perpetrating the pernicious act would have covered his tracks leaving no trace of illegal moneylending.

[4] We had earlier allowed the request of all the appellants to have the three appeals heard together and with that the court was able to see the whole big picture and to detect the uncanny similarities in the modus operandi deployed. It is a case where the differences lie in their similarities to each other as we shall explore, not to mention also where the similarities lie in their differences!

PROCEEDINGS IN THE HIGH COURT

[5] The first appeal involved the 'purchaser' claiming for specific performance of the relevant sale and purchase agreement ('SPA'), the removal of the caveat lodged and damages arising therefrom. The 'vendor' counterclaimed for the transaction is a sham and an illegal moneylending transaction that is null and void and unenforceable and a return of the title.

[6] In the other two appeals the 'vendor(s)' prayed for a declaration that the transaction is a sham and an illegal moneylending transaction that is null and void and unenforceable and a return of the title and further a cancellation or entry in the title of the 'purchaser' as the registered owner with respect to their respective properties.

[7] The 'purchaser' in turn claimed for vacant possession because the same 'purchaser' is already the registered owner of the property in question as in the second appeal or damages from loss of use of the property as in the third appeal and in both for the removal of the caveat lodged by the plaintiff(s) and damages to be assessed.

[8] The High Court in all the three cases had found for the 'purchaser', having being convinced that the documents are consistent with a straight forward sale and purchase transaction and that the 'vendor(s)' had not proved the illegal moneylending transaction.

[9] The 'vendors' have all appealed to this court from the respective decisions of the High Court and the parties shall be referred to as they were in the High Court as plaintiff(s) and defendant(s) or sometimes for clarity and to avoid confusion, by their names.

CIVIL APPEAL J-02(NCVC)(W)-463–03 OF 2018 ('APPEAL 463') MAHMOOD BIN OOYUB V LI CHEE LOONG ('MAHMOOD'S APPEAL')

[10] The defendant Mahmood, a retiree, was already 69 years old, when he was persuaded by an acquaintance one Luqmannur Hakim ('Luqman') to enter into a business venture. They started a partnership duly registered as Sykt Kristal Biru Enterprise. What happened subsequently was anything but crystal blue!

[11] Like all businesses, some funds were needed of about RM250,000 and Luqman introduced him to one Ponytail Lee as the man was so introduced. He could lend the money needed for capital but needed the title to the property owned by the defendant. The defendant has to his name a piece of property in a single storey bungalow of about 5,400 sqft sitting on Geran 45482 Lot 14296 Mukim Bandar Johor Bahru, Daerah Johor Bahru, Johor ('the property').

[12] The defendant was initially reluctant for that was the only property he has which is the abode for his wife and him in their old age. He relented after Ponytail Lee brought him to the law office of Messrs Woon Wee Yuen & Partners. Ponytail assured the defendant that the title was merely needed as a security to ensure the repayment of the loan. He was then asked to sign a blank and undated SPA.

[13] Upon signing the SPA, the defendant was given a bank draft of RM250,000 from one Puan Fauziah (PW1) who was a lawyer in the law office. Ponytail Lee was present in attendance at the law office throughout the execution of the relevant documents culminating in the handing over of the bank draft to the defendant on 12 May 2014 at the law office.

[14] The defendant also parted with his original issue document of title to the property to the lawyer from the law office of Messrs Woon Wee Yuen and Partners. Little did he realise that he would not see his title again and that he would have to sue for its return.

[15] One unusual feature of the transaction is that the plaintiff and the defendant had never met each other until the trial at the Johor Bahru High Court!

[16] The lawyer Puan Fauziah PW1 narrated in her testimony that the relevant documents to effect the transfer including the Form 14A were signed four days later on 16 May 2014.

[17] The defendant understood that as a borrower he must make repayments of the loan on time and so upon instruction from Ponytail he made the following repayments to the accounts as directed:

(a) on 16 May 2014, 17 May 2014 and 18 May 2014 a sum of RM5,000.00 each totalling RM15,000 was banked into the Public Bank account number 4–5588194–27 belonging to LAM AH WAH. The three bank-in slips were marked as exh D17 at p 265 of *RR* Vol 2;

(b) on 19 May 2014 another sum of RM15,500 was banked into the same Public Bank account in the name of LAM AH WAH (number 4–5588194–27). The bank-in slip was marked as exh D18 at p 266 of *RR* Vol 2; and

(c) on 17 June 2014, 25 July 2014, 15 August 2014 and 29 September 2014 amounts of RM12,800, RM13,500, RM12,500 and RM5,000 respectively were banked into the account of one MAWAR CONSTRUCTIONS in Maybank with the account number 551258507311. The four bank-in slips were marked as exhs D14(a), (b) and (c) at pp 267–269 of *RR* Vol 2.

[18] Puan Salwa Laila (DW1) gave evidence that the Maybank bank-in slips for the account of Mawar Constructions were genuine. Learned counsel for the defendant said that upon strenuous objection from the plaintiff's solicitors, the owner of the account was not revealed in court. One wonders why the strenuous objection unless the evidence would be detrimental to the plaintiff. If the owner of the account is totally unrelated to the plaintiff, Ponytail Lee or Lam Ah Wah, then the rationale for resisting disclosure is not there.

[19] In total, the defendant had re-paid an amount of RM74,300 to the above accounts of LAM AH WAH and MAWAR CONSTRUCTIONS. It was not for the defendant to ask why he should be making repayment into these accounts as directed because as a borrower he must know his position not to be difficult. Looking back, it must be the outworking of the proverb observed by Solomon of old that the rich rule over the poor and the debtor is a slave to the creditor!

[20] After having objected vigorously to the identity of the owner of Mawar Construction being revealed by the bank officer DW1, it appears quite hollow for the plaintiff to now submit that there is no connection between the plaintiff and Mawar Constructions to say that the payments were for the interest charged.

[21] We are more disturbed by the question as to why a borrower like the defendant would want to make unrelated payments at all to Lam Ah Wah and Mawar Constructions unless he had been directed to by the said Ponytail Lee.

[22] Even assuming that there would be people doing that it would be a strange coincidence for the same name of Lam Ah Wah's account to surface again in another case pleaded by the defendant and for which evidence was led.

[23] The defendant pleaded in his defence and counterclaim in paras 9(a), (d) and 11(b) thereof, the identical accounts which another borrower was directed to make payments in Civil Suit No 22NCvC-138–08 of 2015 in the Johor Bahru High Court which was reported in *Ngai Fong Lan (P) & Anor v Li Chee Loong* [2018] MLJU 1518, a decision of Dr Choo Kah Sing J holding that the sale and purchase transaction was a sham and which decision was affirmed by the Court of Appeal.

[24] The probability of that happening can be likened to being struck by lightning on two separate occasions at the same place in the same month and still survived!

[25] *The Book of Odds* by Amram Shapiro, Louise Firth Campbell and Rosalind Wright, published by William Morrow, in a study done in the United States at p 455 recorded that only 1 in 1,101,000 people is struck by lightning in a year and one can imagine the odds being multiplied manifold when one talks of being struck twice in the same place and the same month!

[26] After all there are just millions of names and the sheer impossibility of two different borrowers banking in the interest payments to the name of the same account holder with the same account number and bank! For that to happen can be likened to a typist hammering away blindfolded and randomly at a keyboard and out came Martin Luther Jr's speech on 'I have a dream'! The sheer impossibility of it is only too obvious to state.

[27] The learned judge there in *Ngai Fong Lan (P) & Anor v Li Chee Loong* had stated as follows:

> [4] The plaintiffs are husband (2nd plaintiff/PW1) and wife (1st plaintiff/PW2). They are in their early 60s' and late 50s' respectively. The plaintiffs averred that in

October 2014, the 2nd plaintiff borrowed a sum of RM40,000.00 (hereinafter 'the borrowed sum') from a person by the name of Kelvin who the plaintiffs asserted was an illegitimate money lender.

[5] The plaintiffs averred that the 2nd plaintiff in actual fact received cash of only RM33,900.00 out of the borrowed sum from Kelvin. The 2nd plaintiff explained that a sum of RM6,100.00 was deducted from the borrowed sum for (i) three months chargeable interest at the rate of 3% per month calculated based on the borrowed sum (RM40,000.00 x 3% = RM1,200.00 x 3 months = RM3,600.00), and (ii) stamp duty of RM2,500.00. The borrowed sum was paid through several convoluted transactions as instructed by Kelvin, the 2nd plaintiff averred.

[6] In addition to the above, the plaintiffs averred that they were required to execute the impugned SPA as security for the repayment of the borrowed sum. The plaintiffs did not deny executing the impugned SPA document. However, the 1st plaintiff denied having knowledge of the contents of the impugned SPA until the 2nd plaintiff defaulted in his repayment of the borrowed sum. The 2nd plaintiff averred that he executed the impugned SPA in the belief that it was a security document for the repayment of the borrowed sum. The plaintiffs, at all material times, had no intention to sell their property.

[7] The plaintiffs were also required, as instructed by Kelvin, to deposit their house's title deed Geran 178738, Lot 57845, Mukim Plentong, Daerah Johor Bahru which has a postal address known as No. 42, Jalan Molek 2/13, Taman Molek, Johor Bahru (hereinafter 'the property') to the defendant or his solicitors as security.

[8] *The impugned SPA was prepared by a firm of solicitors Messrs. Woon Wee Yuen & Partners* (hereinafter 'the Firm') in Skudai, Johor. The plaintiffs averred that it was Kelvin who brought them to the Firm to execute the impugned SPA on 23.10.2014.

[9] The plaintiffs averred that after they had executed the impugned SPA in the Firm, the 2nd plaintiff was accompanied by Kelvin to the 2nd plaintiff's bank, ie Public Bank, Taman Perling, Johor Bahru. At the bank, *Kelvin deposited cash of RM300,000.00 into the 2nd plaintiff's account. However, the record shows the depositor was the defendant, instead of Kelvin.*

[10] The 2nd plaintiff averred that on the same day *he was instructed by Kelvin to transfer via ATM a sum of RM5,000.00 into an account holder by the name of Lam Ah Wah (hereinafter 'LAW')* who also had an account with Public Bank. The 2nd plaintiff also withdrew a sum of RM10,000.00 cash to pay to Kelvin.

[11] On the following day (on 24.10.2014), under the instruction of Kelvin, the 2nd plaintiff withdrew a sum of RM251,100.00 from his account and deposited the said sum into the account of LAW.

[12] With regard to how the money had transacted, it is illustrated as below:

Cash deposited into the 2nd Plaintiff's account by Kelvin on 23.10.2014	RM300,000.00
Less:	
Paid to LAW via ATM (on 23.10.2014)	RM5,000.00
Paid to Kelvin by cash (on 23.10.2014)	RM10,000.00
Paid to LAW by cash (on 24.10.2014)	RM251,100.00

Balance retained by 2nd plaintiff	RM33,900.00.

(Emphasis added.)

[28] We of course can appreciate that there may be strange coincidences in life but if we have to choose between sheer coincidences with no interference of an unseen hand as opposed to a scheme where the *dramatis personae* are actively working behind the scene, we would choose the latter.

[29] It goes without saying that in cases of illegal moneylending transactions it is quite a common feature for the borrower/'vendor' to have to use the lender/'purchaser's' solicitors for to protest would be a no-deal. The borrower is in no position to bargain.

[30] It must be rather unfortunate for Messrs Woon Wee Yuen & Partners to have acted for 'purchasers' who ended up having disputes with the 'vendors' as to the true nature of the transaction and having to take legal action to evict the 'vendors'. See another illegal moneylending case involving the same solicitors in *Pannir Selvam a/l Sinnaiyah & Anor v Tan Chia Foo & Ors* [2019] MLJU 1699 from Johor Bahru High Court and also the second and third case under discussion below in Civil Appeal J-02(NCVC)(W)-1603–08 of 2018 ('Appeal 1603') Tan Bok Eng v Lim Len Tat & Anor ('Tan Bok Eng's Appeal) and in Civil Appeal J-02(NCVC)(W)-2049–10 of 2018 ('Appeal 2049') Pushpavalli a/p D Suppaiah & Ors v Lim Len Tat & Anor ('Pushpavalli's appeal').

[31] It does not appear fair for such a misfortune to have been visited upon the same solicitors and perhaps the explanation is more likely that the said solicitors appeared to have won the trust of the illegal moneylender(s) in minding his own business and looking the other way without asking too many questions. Illegal moneylenders would have an affinity for solicitors who are prepared to lend an air of legality to the transactions dressed up as a sale and purchase transaction and who are prepared not to bat an eye and indeed to be wilfully blind to what is happening.

[32] For the said defendant Li Chee Loong, Messrs Woon Wee Yuen & Partners and Lam Ah Wah to coalesce together all between May to October 2014 in transactions involving 'purchasing' two properties cash of a total of RM550,000, would require all the universe conspiring to make it happen, to borrow an expression from Paulo Coelho in *The Alchemist.* It is more probable that it was the active participation of the *dramatis personae* behind the curtain, running low on characters they can trust, that was behind the personalities coming together to perpetrate or participate in an illegal act.

[33] We agree with learned counsel for the defendant that the similarities are so striking that it cannot be a construct of the defendant nor a mere coincidence. Section 15 of the Evidence Act 1950 allows for the admission of similar fact evidence as follows:

> 15 Facts bearing on question whether act was accidental or intentional
>
> When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of series of similar occurrences, in each of which the person doing the act was concerned, is relevant.
>
> ILLUSTRATIONS
>
> (a) A is accused of burning down his house in order to obtain money for which it is insured.
>
> The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant as tending to show that the fire was not accidental.
>
> (b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.
>
> The question is whether this false entry was accidental or intentional.
>
> The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A are relevant.
>
> (d) A is accused of fraudulently delivering to B a counterfeit ringgit.
>
> The question is whether the delivery of the dollar was accidental.
>
> The facts that soon before or soon after the delivery to B, A delivered counterfeit dollars to C, D and E are relevant as showing that the delivery to B was not accidental.

[34] In civil cases the rule in relation to similar fact evidence was explained in the English decision of *Mood Music Publishing Co Ltd v De Wolfe Publishing Ltd* [1976] Ch 119 where Lord Denning MR held as follows as summarised in the headnotes:

> Held: The admissibility of evidence as to similar facts has been much considered in the criminal law. Some of them have reached the highest tribunal, the latest of them being *Reg v Boardman* [1975] AC 421. The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. *In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side and also that the other side has fair notice of it and is able to deal with it.* (Emphasis added.)

[35] Here we are satisfied that the probative value overshadows the prejudice that may be caused as the plaintiff Li Chee Loong was given every opportunity to explain the uncanny coincidences and no explanation had been forthcoming with respect to facts that are certainly relevant to the defendant's assertion that he had been instructed by Ponytail Lee to bank into the accounts of Lam Ah Wah and Mawar Constructions.

[36] The approach in *Mood Music*'s case was cited with approval in *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors* [2013] 10 MLJ 1; [2013] 5 CLJ 488 where it was held at p 500 as follows:

> In civil cases the court would admit evidence of similar facts if it was logically probative and it was not oppressive or unfair to the other side to admit the evidence.

[37] After making the last repayment on 29 September 2014 the defendant could not continue making further repayments as his tap had dried up and his resources exhausted. He lodged a police report on 5 October 2014 for fear that the property may be transferred out to the lender that he could only link to one Li Chee Loong that he had never met for a loan of RM250,000 taken for which he had surrendered his land title when the property is easily worth much more.

[38] He also proceeded to lodge a private caveat on 21 October 2014 and in his statutory declaration in support of the caveat he stated that he had borrowed RM250,000 from Li Chee Loong and he was worried that the property would be transferred out.

[39] The plaintiff Li Chee Loong, unlike a normal purchaser and especially one who had paid the full purchase price, did not even bother to lodge his own caveat on the land. Either he was trusting of the defendant whom he had not met or that he already had the upper hand, in the transfer having been executed and the title having been deposited with his own solicitors.

[40] It has become an almost reflex action in a standard operating procedure or checklist that as soon as the deposit is paid towards the purchase of a property, and more so when the full purchase price had been paid, for the purchaser to lodge a caveat against the property immediately. That is to protect the interest of the purchaser in that the caveat would be notice to the world that the caveator has a right to interest or title to the land and the presence of the caveat would also prevent the owner from dealing with the land until the caveat is removed.

[41] The delay until 7 January 2015 when the plaintiff Li Chee Loong lodged his caveat, was of course to allow the defendant time to repay and only

A if he could not, then the caveat would be necessary while the Form 14A is being sent for adjudication to find out the government's valuation for the payment of stamp duty.

B **[42]** The delay was some eight months from the date the SPA was signed. It has not escaped our notice that whilst a normal SPA would only require a payment of 10% deposit towards purchase price upon the execution of the SPA and the balance purchase price being payable within three months plus another month of extension with interest, and indeed that were expressly spelt out in the SPA, here the full payment of purchase price was said to have been made C upon the execution of the SPA.

[43] Whilst that alone by itself may be explained away in that in a fire sale for a lower purchase price the vendor might want the full purchase price to be paid upon the execution of the SPA, one would expect the purchaser in such a case D to have entered his caveat immediately.

[44] However as pointed out by learned counsel for the defendant, the plaintiff had gone down on record as saying both in the statement of claim as well as in his evidence in court that the entire purchase price is RM250,000. E

[45] He must have forgotten what he said in his statutory declaration in support of his entry of caveat, probably prepared at the time the SPA was signed that he had paid RM250,000 as the initial deposit to the seller and that whilst F awaiting the payment of the balance purchase price he wanted to enter the caveat to protect his interest. The statutory declaration avoided saying altogether how much the purchase price is and with that what is the balance purchase price!

G **[46]** To be less than truthful one needs to have a good memory because one needs to remember different versions of the 'truth' and fortunately for the defendant, the plaintiff tripped over on this! It stood out like a sore thumb. To have paid the full purchase price cannot be reconciled with to have paid an initial deposit of the amount which is the same as the full purchase price with H a balance to be paid!

[47] We were all not born yesterday and the plaintiff would have to try harder if he wanted to convince us to believe him.

I **[48]** We pause to observe that in a lot of illegal moneylending transactions the purchase price seems to be an amount that is quite malleable to some massaging. It is rather uniquely unusual to say the least and that is because the amount is not important for on default the whole of the property would be transferred over to the lender/'purchaser'.

[49] There is a further departure from normal conveyancing practice as confirmed by none other than Puan Fauziah PW1, the solicitor handling the transaction, in that whilst the full purchase price is said to have been paid upon the signing of the SPA and the title delivered to the purchaser's solicitors, surprisingly here the keys to the property were not handed over to the purchaser's solicitors and indeed the keys were never demanded by the plaintiff at any time. That appears to be more consistent with cases where the illegal moneylender would have just used force to forcibly enter the house for after all, even from common knowledge acquired through one's reading of the press, their tactics would include spilling red paint on the door to embarrass the owner and also that of criminal intimidation if the amount plus interest is not paid to the last sen.

[50] There must either be a lot of trust built up between the 'vendor' and the 'purchaser' as in between the defendant and the plaintiff even though they have not met or seen each other or more likely that the time had not come to deliver vacant possession yet until the defendant should first have defaulted in the repayments even though the SPA said the sale was with vacant possession and the full purchase price paid up front.

[51] The fact that the Form 14A transfer form was only submitted for adjudication in November 2014 to ascertain the stamp duty payable upon instruction by the plaintiff as PW1 Puan Fauziah testified, would be more consistent with the defendant's version that the repayment was to be made within six months of the disbursement of the loan of RM250,000 on 12 May 2014 with interest at 5% per month.

[52] One would have thought that it is the solicitor who would determine when the Form 14A is submitted for adjudication especially when the full purchase price is said to have been paid upon signing of the SPA rather than the 'purchaser' so called, to use a euphemism, 'instructing' the solicitor to submit the Form 14A for adjudication.

[53] The aberration becomes more acute when the SPA had provided in cl 8.2 thereof that the purchaser's solicitors shall present the Form 14A for adjudication within 30 days of execution of the SPA.

[54] The plaintiff had introduced himself to the court in his witness statement that he is a property investor with over ten years' experience, and one would suppose, looking for a good buy especially in Johor Bahru where he operates. He said he was introduced to the property by his friend, one Mr Ong and that before buying, Mr Ong and him went to see the property and looked from outside the fence but did not enter the property nor did they meet the defendant.

A **[55]** One would have thought that it would be more normal for a purchaser to want to see the inside of the house to know its condition, and especially when one is purchasing a residential property, to at least meet the owner and size up the owner as to whether he is genuine and who is staying in the house at the moment.

B

[56] The plaintiff trusted his friend Mr Ong who said the price of RM250,000 is cheap and far below market price with regard to the type of property and the size and location of it. Under cross-examination he said there was no need to negotiate on the price because it was already so low.

C

[57] The plaintiff did not call this 'Mr Ong' as his witness and as far as the defendant is concerned he had no intention to sell the property much less to appoint an agent to look for a purchaser. There was no land search done on the property before the plaintiff decided to buy it.

D

[58] The plaintiff said he had engaged the services of Messrs Woon Wee Yuen & Partners to act for him because he had used the said firm for over ten other purchases before! If that were true, taking an average of RM250,000 per property, it would be some RM2.5m worth of properties purchased. Perhaps ten properties are a lot and so when asked for the address of the properties under cross-examination, he could not remember!

E

F **[59]** Puan Fauziah PW1 further testified that the plaintiff had instructed her to prepare SPA based on an outright cash purchase. That seems to be the mode of payment for the other transaction too in *Ngai Fong Lan (P) & Anor v Li Chee Loong*.

G **[60]** PW1 testified that she handled the conveyancing file until November 2014 after which she went on maternity leave and the file was taken over by the other lawyers in the firm, one Puan Nurul Syafawaty and Mr Woon himself but none of these lawyers were called as witnesses. Granted a single anomaly or aberration may not arouse any suspicion. However here is a case where the

H unusual features, when taken together, strongly support the suspicious circumstances that would negate a genuine SPA and lend credence to the fact that the SPA and the related documents are all a sham designed to distract and deceive the enforcement authority and vulnerable borrower like the defendant.

I **[61]** On the balance of probabilities the overall anomalies and aberrations are such that they point to a moneylending transaction and an illegal one as such for it is not in dispute that the plaintiff is not a licensed moneylender.

CIVIL APPEAL J-02(NCVC)(W)-1603–08 OF 2018 ('APPEAL 1603') TAN BOK ENG V LIM LEN TAT & ANOTHER ('TAN BOK ENG'S APPEAL')

[62] In this appeal, the appellant Tan Bok Eng ('TBE') was the plaintiff in the civil suit in the High Court below where he had claimed for the cancellation of the registration of his property in the name of the defendant Lim Len Tat ('LLT') and the restoration of the property to his name as well as the return of the title to his property on ground that the SPA and the related documents were a sham and in any event the transaction is an illegal moneylending transaction such that the documents executed are null and void and unenforceable and that the transfer was effected fraudulently. TBE had also joined in the solicitors who acted for LLT in the transaction, Mr Woon Wee Yuen ('WWY') as the second defendant.

[63] LLT in a separate originating summons action as the plaintiff there had applied for vacant possession of the said property. The two cases were heard together by the High Court and TBE's claim was dismissed and LLT's claim was allowed with the result that the appellant TBE had appealed to this court.

[64] TBE narrated the story as to how he was enticed by one person known only to him as 'Lee' to borrow money from time to time on a high interest rate per month beyond that permitted under the law. He admitted having borrowed from Lee about RM100,000 for which he had repaid between RM70,000 to RM80,000. This evidence was not challenged by LLT's counsel under cross-examination. TBE made it clear that he borrowed from Lee and not from LLT.

[65] For the purpose of the loan he was instructed by Lee to attend at the office of a legal firm known as Messrs Woon Wee Yuen & Partners to sign a slew of documents all in one go, which documents were a sham designed to dress up the illegal moneylending transaction as an innocuous sale and purchase transaction.

[66] He could not recall exactly what he signed because he was not given a copy when he asked for them at the time of signing. He was told by a legal clerk attending to him that the documents had to be stamped and legal fees had to be paid before a copy of the documents could be released to him. From the documents found in the bundle of documents ('BODs') filed by LLT and WWY for the purpose of the trial, it would appear that the documents included an SPA with one Bernard Lee Poh Heng ('Bernard Lee'), a deed of rescission and revocation ('DRR') between TBE and Bernard Lee, another SPA with LLT and a Form 14A memorandum of transfer under the National Land Code ('the

NLC') between TBE and Bernard Lee as well as another Form 14A between TBE and LLT. TBE stressed that all these documents were signed with the relevant details left blank.

[67] He had never met the transferee LLT before and only realised that the transfer of his property had been effected when he received a notice of delivery of vacant possession from LLT's solicitors. As for Bernard Lee, he does not know him from Adam and has never met him! He had all along dealt with Lee and the borrowing was from Lee. His contention was that LLT is a proxy of Lee who had funded his borrowings from the beginning leading to the execution of the SPA of his property.

[68] His property is a house held under Geran 338205 Lot 77232 Mukim Plentong District of Johor Bahru in Taman Molek, Johor Bahru ('the property').

[69] According to TBE, he was assured by Lee as well as a legal clerk of Messrs Woon Wee Yuen & Partners that the documents were a security for the loans in case he could not pay back. All the documents were signed in the presence of the legal clerk and not before any solicitors.

[70] Though all the documents were signed in one sitting, yet he was later to discover from the documents filed that they were dated differently as follows:

(a) the SPA between Bernard Lee and TBE dated 31 May 2013;

(b) the Form 14A between TBE and Bernard Lee;

(c) the SPA between TBE and LLT dated 18 December 2014;

(d) the Form 14A between TBE and LLT dated 18 December 2014;

(e) the DRR between TBE and Bernard Lee dated 17 December 2014; and

(f) a letter of authorisation dated 18 December 2014 said to have been signed by TBE.

[71] The solicitor who came to the court to give evidence for WWY, one Nurul Safwaty, does not have personal knowledge of the transaction and in fact was stuck on many occasions under cross-examination when she could not answer the questions asked and coyly said that the questions had to be directed to WWY who did not bother to come to explain the strange and unusual features of the sale and purchase transaction.

[72] To begin with Nurul Safwaty was not the solicitor who attended to the first SPA between TBE and Bernard Lee said to have been entered into on

31 May 2013; which TBE denied. The solicitor who attended to the alleged SPA was one Farida bt Pardi who also did not take the stand for WWY.

[73] One would have expected a solicitor named in the suit to have personally come and explain the unusual transactions with a DRR prepared and an amount paid in a paper bag containing cash of which nobody seems to know whether the sum said to be RM80,000 was actually paid to Bernard Lee.

[74] TBE's stand is that he had never met Bernard Lee and was surprised to have found out that he had signed an SPA to sell his house to Bernard Lee, only to have it terminated mutually by consent in the DRR with the payment of RM80,000 said to have been paid on his behalf by LLT when LLT bought the same property from TBE via a second SPA dated 18 December 2014.

[75] Surely one's name and association as a solicitor is important to any solicitor sued in court where impropriety had been levelled at the solicitor for been a willing party to lend an air of respectability and legality to an otherwise illegal moneylending transaction. The Moneylenders Act 1951 in s 29AA(1) has made it a criminal offence for anyone who assists an unlicensed moneylender to carry on his business in contravention of s 5(1) of the Act shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding twenty thousand ringgit or to both.

[76] One is of course curious how a young person like LLT of 24 years old could have so much cash reserves to buy so many properties in so short a time in Johor Bahru. His evidence is that when he sees a good buy he would buy it without even ever meeting the vendor nor even inspecting the properties. This is not to mention that all the properties were below market value as seen from the adjudicated amount from the Stamp Duty Office with the unfortunate experience attending to all his purchases in that he had to take eviction action against all of the vendors.

[77] Either it is a case of the curse of bad luck following him like a leech or that he was a front for the illegal moneylenders and the face for the registration of the properties forfeited to the moneylenders at an unusually cheap price as all the documents needed to effect a transfer and to create a semblance of the full purchase price having been paid had all been signed by the borrower/'vendor' at his weakness point of vulnerability when he needed the loan.

[78] The borrower is not in a position to bargain, much less to have his own solicitors act for him, for that would spoil the deal. Little wonder that in most illegal moneylending transactions the borrower has to use the services of the lender's solicitors with the borrower 'electing' not to be represented and if need

be, only for the limited purpose of acting for the borrower with respect to the redemption of the loan taken by the borrower from his bank.

[79] Invariably too, like here, the borrower would not be kept posted as to what is happening to the transactions until he gets notice of vacant possession by the new registered owner of the property.

[80] The source of LLT's income is doubtful and when probed further in the crucible of cross-examination he had to say he had no documents to substantiate where the payments in the form of bank drafts for the purchase price had come from and even in the case of legal actions taken against him, he appeared quite clueless and quickly push it to his lawyer WWY who unfortunately did not come to testify to assist him.

[81] LLT said his source of income is in the hand phone retail business he shared with his partner under the name of Heng Fat Hand Phone in Selangor. Surprisingly he does not even know his partner's full name and only referred to him as 'Ah Heng'. Perhaps it is also a characteristic feature of people involved in this web illegal moneylending transactions to know and refer to one another by nicknames and even assuming different names for different transactions with probably different handphones and different numbers used for different borrowers so as to make themselves incommunicado when the property is transferred to their nominee and the 'file', so to speak, is closed.

[82] LLT was not able to produce any registration of the business with SSM either showing the name of the partnership business 'Heng Fat Hand Phone' or his partner's name hitherto known only to him as 'Ah Heng'.

[83] Sensing that his narrative is not so convincing he also told the story of how from a very young age he has become an astute investor, knowing a good buy when he sees one as typical of men who strikes while the iron is hot. Apparently his buying and selling of properties had paid off but alas under cross-examination he cannot even remember how many properties he has.

[84] We are reminded of a man who said if you truly know how much you have then you are not truly rich enough; perhaps a case of having too many and losing count of it! We would say it is more consistent with opening one's mouth too big to say too soon without thinking of what may be asked further and when asked, to have to respond with an embarrassingly deafening 'I don't know'.

[85] Even in the answer he finally volunteered in the four, five or six properties that he has, it is difficult to believe that he had the financial resources for the purchase and more a front used by illegal moneylenders to register their spoils!

[86] Whilst ordinarily it may not seem fair for a young investor in properties like LLT to be beset with problems in having to evict his vendors in almost all the transactions, one's sympathy would quickly turn to scorn to discover that there was deceit and trickery involved where the borrower had been deprived of his security without the proper safeguards afforded by the law.

[87] Learned counsel for TBE submitted that LLT is more a runner or proxy for those moneylenders whose identity cannot surface beyond the fanciful nicknames and whose handphone number would 'no longer be in service' once the property is transferred over to their safe haven. We agree that such is the modus operandi of those involved in the nefarious business of illegal moneylending business whose marketing strategy of making their presence felt by pasting their advertising stickers all over the lamp posts at no costs would cause even advertising channels like YouTube and Facebook to blush! What's more when enforcement is weak by the local authority under whose jurisdiction the moneylenders come under, the illegal moneylenders can only become brazenly bold.

[88] When LLT claimed to have purchased all his properties in cash with his source of funds shrouded in secrecy because it is in the form of a bank draft which could always be purchased by the funders behind the scene, his evidence becomes totally unimpressive if not inherently incredible!

[89] He said he was earning about RM1,200 per month when he started working since 18 but with a wife not working and two children to support and a car loan to service, and if we were to believe him, then he must be having the Midas touch where everything he touches would turn to gold where he would flip over one property and reinvest it in even higher yielding investments in other properties.

[90] TBE led evidence of two different civil suits against LLT and WWY where they were sued for transactions that were dressed as an SPA but in reality an illegal moneylending transaction with the same modus operandi. Are we supposed to believe in a stroke of bad luck that had come to strike LLT as a young investor or is it not more consistent with lending his name and face to those who need someone to front for them in an illegal moneylending business?

[91] When probed further on the number of suits pending against him, LLT said that the question would be more appropriately asked of his solicitors,

whose presence he conveniently did not help to secure. It baffles us how some one of his age could be facing suits unfazed unless there are godfathers funding his defence and supporting him from behind incognito.

[92] In Civil Suit N JA-A52NCVC-185–10 of 2017, LLT in cross-examination, admitted he bought the property from the plaintiff there in cash but apparently he must have suffered from a bout of amnesia for he cannot remember how much he paid cash for the purchase.

[93] When cornered as to how he could have purchased three properties in cash in the three civil suits, the third being the case of Pushpavalli's appeal to be considered after this case, of about RM730,000 based on the disclosed SPA price, it became only too obvious that his declared income tax between the years 2013–2016 could not shore up his financial capacity to make such cash purchases.

[94] LLT further tried to justify his acumen for making the right property investments in such a short span of time by saying that each time he would flip over an asset the gains would be transacted through his Maybank account but in spite of ample time given to him to produce his bank statements he still could not produce them at the trial.

[95] When LLT was referred to two cash deposit slips at p 463 of the appeal record, he very conveniently said that the money was deposited by him if he was not mistaken. It raises suspicion as he cannot even be positive as to who was paying the purchase price if indeed it was purchase price that he was supposed to have paid.

[96] At the end of the day neither LLT nor Nurul Safwaty was able to confirm if the balance purchase price had ever been paid. The two cash deposit slips were merely marked as ID for identification and not as exhibits as the origin and relevance to the transaction is doubtful.

[97] There was also another unusual feature of this transaction in that the various correspondences with respect to the redemption of the property were not copied to TBE.

[98] Surely even if Messrs Woon Wee Yuen & Partners acted for the purchaser LLT and not for the vendor TBE, the said firm must be acting for TBE with respect to the limited purpose of redemption of TBE's property and hence the natural need to keep TBE informed as to the progress of the redemption.

[99] Though learned counsel for TBE submitted that the redemption could not have been authorised by TBE as he had not appointed them in writing to effect the redemption or to write to his bank HSBC for the redemption statement, it is more probable that TBE must have signed a letter of authorisation with respect to the said Messrs Woon Wee Yuen & Partners writing to the bank for the redemption statement and acting for him with respect to the discharge of charge.

[100] It is not difficult to understand why TBE was kept in the dark with respect to the redemption of the property from his bank HSBC for the simple reason that had he been alerted to it he would have revoked the authority to act given to Messrs Woon Wee Yuen & Partners with respect of the redemption and the preparation of the discharge of charge and would even lodge his caveat against the property to prevent the transfer of it to LLT.

[101] With respect to the payment of the redemption sum of RM143,614.13 it was made by way of a banker's cheque which LLT said he bought and gave it to WWY. However, LLT had not been able to show where he had withdrawn the money to purchase the banker's cheque, furthering and fortifying TBE's assertion that the money was from an illegal moneylender who had only used LLT as his proxy or nominee to enter into the SPA of 18 December 2014 with TBE.

[102] The straw that broke the camel's back must certainly be the first SPA between TBE and Bernard Lee and the even more suspicious DRR and the justification to pay RM80,000 as agreed liquidated damages for TBE to breach the first SPA and to sell the same property to LLT. Of course the sale must be for a higher price for otherwise the sham would be a see-through but as we shall see, not high enough to make commercial sense let alone to satisfy common sense.

[103] However it is the RM80,000 allegedly paid by LLT to Bernard Lee in an enclosed paper bag which nobody seems to be able to verify and the disappearance of Bernard Lee altogether — indeed he disappeared incognito as quickly as he had appeared, that is most disturbing. What is eerily strange is that there is no page numbering 2 after page numbering 1 which begs the question why would anyone print a set of two page document with only the page numbering appearing on the first page!

[104] As a matter of prudence passed down from time immemorial, a signing page should always have at least a line flowing over from a previous page so as to avoid the accusation that it could have been added onto the main agreement when it was not part of the main agreement.

[105] TBE's version is that he had never met this Bernard Lee and when Nurul Safwaty wanted to vouch for the credibility of this payment of RM80,000 she produced at a trial a receipt for the correct amount only to have it pointed out to her that it is for a different property!

[106] It was a gaffe that she must have wished a hush of wind could just transport her away from the witness stand. Instead she said that WWY would be able to explain the discrepancy but he did not turn up as a witness at all.

[107] We can only hope that this is not the tip of the iceberg where there are many such payments of RM80,000 for intentional termination of a first SPA to justify a non-existent payment but serves well to explain why a further sum had been paid towards the purchase price when it was not paid at all!

[108] The sequence of events is even more astounding when LLT said that he had never met Bernard Lee and that he had put the cash of RM80,000 in a bag which was given to an agent who purportedly passed the same to Bernard Lee in the absence of LLT but at Messrs Woon Wee Yuen & Partners. LLT said he had waited in the law office until evening but as Bernard Lee did not turn up, he had left the bag with his agent. What baffles us is that LLT cannot even remember the name of this agent on whom he had entrusted the RM80,000. Perhaps while the rest of us would insist on a paper trail and receipt for such an unusual cash payment, those whose natural habitat is the seedy world of illegal moneylending, would prefer cash payment which source is not traceable and which receipt cannot be verified.

[109] When TBE's version is that he had not sold the property to Bernard Lee and that there was thus no need to terminate the first SPA coupled with the mysterious payment to Bernard Lee, the suspicion becomes more palpable to say the least! Under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'), all solicitors, and Messrs Woon Wee Yuen & Partners is no exception, should know as part of 'Know Your Client' policy, who Bernard Lee is, as in all good practices of avoiding money laundering activities, since an advocate and solicitor is a 'reporting institution' under the AMLA and an offence under s 5 of the Moneylenders Act 1951 is a 'serious offence' under the AMLA.

[110] One would have expected such a big sum of money to be paid through solicitors or at least by way of banker's cheque so that there is some credible proof of payment having been made but there are people who would prefer cash payment that is not easily traceable with no document trail.

[111] LLT said Bernard Lee must have received the payment of RM80,000 because a Chinese clerk from Messrs Woon Wee Yuen & Partners had called

him to confirm the same. LLT does not even know the name of this clerk and this clerk was not called as a witness to substantiate such an important piece of evidence.

[112] When one takes a closer look at the dates of the relevant documents the sequence does not make sense at all. There was a bank-in slip at p 499 of the appeal record for a cash deposit of RM70,000 which LLT said it was deposited into the account of Messrs Woon Wee Yuen & Partners on 17 May 2013 about two weeks before the first SPA dated 31 May 2013 was entered into between TBE and Bernard Lee.

[113] No explanation had been forthcoming as to why the cash deposit of RM70,000 had been made even before the first SPA was signed supposedly on 31 May 2013. No one seems to know who deposited this cash deposit of RM70,000.

[114] The letter of authorisation purportedly dated 18 December 2014 at pp 327 of the appeal record given by TBE to Messrs Woon Wee Yuen & Partners to issue and pay the sum of RM80,000 to Bernard Lee as liquidated damages was most probably signed by TBE during the time when the first SPA of 31 May 2013 was signed when at that time nobody as yet would have known that a DRR of 17 December 2014 would be prepared and that there would be a mutual termination of the first SPA.

[115] Even then there was no payment from Messrs Woon Wee Yuen & Partners to Bernard Lee but instead a cash payment in a concealed bag which no one knows whether or not there is cash inside and for that matter cash of RM80,000!

[116] It was all a charade to camouflage and lend legitimacy to a payment of RM80,000 that was in all probabilities never made by LLT to Bernard Lee.

[117] There was also no evidence that the sum of RM80,000. deposited by Bernard Lee into the account of Messrs Woon Wee Yuen & Partners for the first SPA had been released to TBE for if he had not received the deposit then it makes no sense that he must now be paying back the sum of RM80,000 as agreed liquidated damages to Bernard Lee, whom he has never met and from whom he had not received any deposit paid towards a purported sale of his property.

[118] The strangeness becomes more suspicious when cl 16 of the first SPA (p 488 appeal record) provides that in the event of the vendor's default the vendor is to refund all monies paid and on top of that the vendor is to pay agreed liquidated damages of RM80,000. TBE had not paid any sums to

Bernard Lee, let alone a refund of the RM80,000 paid as a deposit and a further agreed liquidated damages of another RM80,000.

[119] The narrative becomes more inherently incredible when one takes the sums as stated in the two SPAs as they are and one would be baffled as to why TBE had wanted to terminate an SPA of a purchase price of RM230,000 for which he had to refund all sums paid and pay a further compensation of RM80,000 only to resell the same property to LLT for RM30,000 more at RM260,000!

[120] He must be beholden or perhaps duty-bound to LLT or to Lee the illegal moneylender to do as he may dictate.

[121] The more we probe the more the anomalies and aberrations show up disclosing a fissure that goes to the very foundation of LLT's case that the documents were anything other than an ordinary SPA.

[122] Nurul Safwaty gave evidence that the RM80,000 paid by LLT in a concealed bag was part of the purchase price consideration of the sale of the property by TBE to LLT. She then explained that there was another sum of RM70,000 paid vide RHB Cheque No 086587 dated 4 July 2013 at p 500 of the appeal record which was part of the purchase price consideration made out by Messrs Woon Wee Yuen & Partners' clients' account to TBE and acknowledged receipt by TBE.

[123] Why would any purchaser deposit the purchase price with his solicitors as early as 4 July 2013 some 17 months before the signing of the SPA on 18 December 2014 unless the first SPA is a decoy or that LLT has a running account with his solicitors Messrs Woon Wee Yuen & Partners to be used for whatever transactions are convenient in the overall scheme of things which by its very nature in an illegal moneylending environment is always in a state of constant flux?

[124] The evidence of DW2 is that she had started to work in Messrs Woon Wee Yuen & Partners only since 14 July 2014 and if that be so she would have no personal knowledge what the payment of RM70,000 was for and she would also have no personal knowledge of the first SPA between TBE and Bernard Lee dated 31 May 2013.

[125] Even taking that she could have been mistaken, there is still the uncomfortable sight of a payment of RM70,000 by Messrs Woon Wee Yuen & Partners from their client's account in favour of TBE dated 4 July 2013 at p 500 of the appeal record. Could it be further payment under the first SPA which was subsequently terminated by a DRR of 17 December 2014?

[126] If that be so TBE would have to refund RM80,000 plus RM70,000 plus compensation for another RM80,000 all because TBE had wanted to sell the same property to LLT for RM30,000 more. The math does not add up and clearly many things are amiss! A

[127] DW2 Nurul Safwaty also testified that a sum of RM30,000 was deposited into the account of TBE two days prior to the SPA dated 18 December 2014. Again this does not add up considering that TBE had never met LLT before and the SPA had not even been signed. It would of course be a different world totally if it is an illegal moneylending transaction where the borrower might end up with a broken arm if he does not honour his part of the bargain after having taken the money. B C

[128] Clause 2.1 of the SPA dated 18 December 2014 between TBE and LLT stipulated that the total sum of RM110,000 as deposit in Item 8 of the Schedule to the SPA was to be paid on the date of the execution of the SPA receipt whereof TBE acknowledged. D

[129] If that be true LLT would have paid RM80,000 as the agreed liquidated damages to Bernard Lee on behalf of TBE, RM70,000 some 17 months before the execution of the SPA and another RM30,000 two days before the execution of the SPA making a total of RM180,000. E

[130] Together with another RM143,614.13 paid towards redeeming the property it would mean that LLT as the 'purchaser' had paid RM323,614.13 which is much more than the stated purchase price of RM260,000! It does not make sense for a purchaser to pay more than the purchase price! F

[131] WWY is eminently positioned to explain but had left DW2 Nurul Safwaty to face the music with many gaps not filled. G

[132] Learned counsel for LLT said LLT had deposited another RM6,900 towards the balance amount on 12 December 2014 at p 463 of the record of appeal and if that be so then the deposit paid at the date of signing the SPA on 18 December 2014 should have been stated as RM186,900. H

[133] Whilst we do not want to read too much into the denomination in cash deposited into the account of TBE, we cannot help noticing that there were 97 pieces of RM50 notes in one instance amounting to RM4,850 and another 41 pieces of RM50,000 making a total of RM2,050. That would be 138 pieces of RM50 notes making RM6,900 which is a rather unusual way to make payments not due yet for the SPA only requires a deposit of RM110,000. I

[134] We know that there are some businesses that deal with cash payments more than others and the world of unlicensed moneylending would be one so as to leave no paper trail where opacity and obscurity is the order of the day.

[135] The period for completion is also unusually long stretching over a period of nearly a year compared to the more usual three months plus a month or so of extension with interest. Considering that the price was below market value it becomes even more unusual that the completion period should stretch over a year with no interests paid unless of course it is to wait for the repayment period to peter out before the so-called realisation of the security.

[136] Whilst under cl 8.2 of the SPA the Form 14A shall be sent for adjudication within 30 days of the execution of the SPA, here it was not sent for adjudication until 6 November 2015; the SPA was said to have been signed on 18 December 2014.

[137] The evidence from the notice of assessment of stamp duty showed that a sum of RM6,600 was paid for stamp duty by LLT and that would put the market value as assessed by the government valuer at RM380,000 based on what is stipulated in the Stamp Act 1949 where it is 1% of the property value for the first RM100,000 and 2% for the next RM100,001 to RM500,000. See the calculation of the Stamp Duty Office itself at p 470 of the appeal record where the market value is stated as RM380,000.

[138] That is an unusually low price without even wasting a breath to bargain; a saving of RM120,000!

[139] Likewise even the first SPA that provided for a 12 months completion period is unusually odd for a much lower purchase price of RM230,000.

[140] It has also not escaped our notice that the deposit in both the SPAs is not the usual 10% but here it is RM80,000 which is about 35% in the SPA with Bernard Lee and in the SPA with LLT it is more than 40%. We are more inclined to think that it is a case where if a borrower cannot repay the loan within a year then the period of repayment is extended with further interest all obliterated and obscured and indeed made opaque by the supposed payment under the DRR!

[141] It is often a characteristic of illegal moneylending transactions masquerading as an SPA that the sums do not always add up because the amount paid is often malleable and massage-able to cater for the element of interest paid upfront by the borrower.

[142] Even with respect to the sum of RM80,000 said to have been deposited with Messrs Woon Wee Yuen & Partners client's account on 1 May 2013 about a month before the first SPA was signed on 31 May 2013, DW2 was unable to tell who actually banked in the said RM80,000. She pushed the buck to WWY who had absented himself as a witness for reasons best known to him even though his reputation and that of his firm is at stake, seeing the number of transactions of this nature that the firm had been engaged in.

[143] Whilst LLT took about a year to pay the balance purchase price without interest, the converse is not true, in that failure of TBE to give vacant possession would require him to pay interest at 10%pa on the purchase price on a daily basis until vacant possession is delivered as stipulated in cl 9.1 of the SPA.

[144] The strategy that LLT adopted in trying to get vacant possession is more akin to that used by loan sharks for here we see that he had disconnected the water supply to the property and TBE had lodged a police report dated 5 October 2016.

[145] The learned judicial commissioner ('JC') had not sufficiently appreciated the discrepancies between what was prepared and what actually transpired that do not resonate with a genuine sale and purchase transaction. In fact, the dissonance is so disturbing as to warrant a careful analysis of the overall evidence adduced.

[146] The learned JC had taken the easy route by stating that oral evidence cannot be admitted to vary the written terms of the SPA, forgetting for a moment that a sham agreement is an exception to the rule against parole evidence under ss 91 and 92 of the Evidence Act 1950. When the defence of a sham agreement is raised the court must of necessity scrutinise the overall conduct of the parties to ascertain if there is any evidence revealing the dissonance and discrepancies that cry out for an explanation and whether any explanation is forthcoming.

[147] The learned JC fell into error in not embarking on such an exercise with the consequence of arriving at a finding that was plainly wrong. We are more than satisfied that this so-called SPA and the various payments said to have been made, have all the indicia of an illegal moneylending transaction.

CIVIL APPEAL J-02(NCVC)(W)-2049-10/2018 ('APPEAL 2049') PUSHPAVALLI A/P D SUPPAIAH & 2 OTHERS V LIM LEN TAT & ANOTHER ('PUSHPAVALLI'S APPEAL')

[148] This is yet another case where the same defence had been raised to the plaintiffs' claim of an illegal moneylending transaction dressed up as a decent

A sale and purchase transaction. It involves the same 'purchaser'/transferee who is now the registered owner of the plaintiffs' property and the same legal firm.

B **[149]** There is thus evidence on top of this case, of at least the above case in Tan Bok Eng's appeal and another case for which evidence had been led involving the same 'purchaser' and the same legal firm which acted for the 'purchaser'.

C **[150]** The High Court did not see anything amiss and hence nothing to be alerted of anything suspicious of what the SPA said and stood for. The High Court allowed the first plaintiff's caveat to be removed and for damages for loss of use of the property since 24 February 2015.

D **[151]** The plaintiffs' claim that the transfer of their property to the first defendant (D1) Lim Len Tat ('LLT') was unlawful and fraudulent and for an order cancelling the said registration of the title in LLT's name and for a return of the title were dismissed by the learned High Court judge. The second defendant (D2) is the legal firm of Messrs Woon Wee Yuen & Partners. The plaintiffs' claimed for damages against both the defendants was also dismissed.

E

[152] Hence this appeal by the plaintiffs as appellants.

F **[153]** The plaintiffs were the registered owners of a single storey corner terrace house in Skudai ('the property'). The plaintiffs are all siblings. The first and second plaintiffs are sisters aged 62 and 52 respectively and they are selling spices in Market Tebrau whilst their brother, the third plaintiff is an accounts executive.

G **[154]** The plaintiffs had borrowed RM60,000 from a moneylender they know as one Mr Siva in Kulai, Johor at an interest of RM3,000 per month. Siva entered a lien-holder's caveat against the property.

H **[155]** The plaintiffs were not able to repay Siva and so there was a threatened auction of the property around September or October 2014. The plaintiffs sought the help of another moneylender called Marcus and Marcus was informed by Siva that he required the sum of RM103,000 for the repayment of the loan taken by the plaintiffs and the removal of the lien-holder's caveat.

I **[156]** The plaintiffs then agreed to take a loan from Marcus for the sum of RM150,000. Marcus then paid Siva for the sum of RM103,000 but the demand draft stated that it was paid by one Tan Weng Giap at p 1442 of the appeal record. Prior to the release of the loan the plaintiffs were required by

Marcus to sign some documents at the law office of Messrs Woon Wee Yuen & Partners at Taman Tun Aminah, Johor Bahru.

[157] According to the plaintiffs they only received a sum of RM18,500 for a loan of RM150,000 taken from Marcus for which RM103,000 went towards paying Siva and with that Siva's lien-holder's caveat was removed. The interest exacted by Marcus was RM10,500 per month!

[158] There is a ring of truth to the plaintiffs' narrative for a land search at pp 1415–7 showed a lien-holder's caveat entered against the said property on 4 September 2012 by one Sivaraja @ Selvarajah a/l Kalimuthu at p 1416. There were also correspondence between Messrs Woon Wee Yuen & Partners and Messrs John Ang & Guna acting for Siva on the payment of RM103,000 and the removal of the lien-holder's caveat and the delivery of the issue document of title. See pp 1418–1421 of the appeal record.

[159] There is also the incontrovertible evidence that the interest charged by Siva was RM3,000 per month as by Messrs John Ang & Guna's letter of 27 November 2014 to Messrs Woon Wee Yuen & Partners at p 1420, it was stated that the sum of RM100,000 must be paid and the cheque cleared on or before 3 December 2014 and if not the owners of the property would have to 'pay an additional sum of RM3,000 which would be valid up to 3rd January 2015'.

[160] Strangely Messrs Woon Wee Yuen & Partners did not state in their correspondence who they acted for.

[161] The RHB remittance application form disclosed the name of the applicant for the demand draft of RM103,000 as Tan Weng Giap and judging from his Identification card number he was born on 22 April 1985; hardly 29 years old at the time of the transaction. The beneficiary name was stated to be Messrs John Ang & Guna. The RHB demand draft was dated 10 December 2014 for RM103,000 at p 1443 of the appeal record and the application to enter a private caveat Form 19B by LLT at p 1444 of the appeal record was also dated 10 December 2014.

[162] LLT would of course like to create the impression that the said Tan Weng Giap's application for the bank draft which led to the withdrawal of the lien-holder's caveat on the property has nothing to do with his purchase of the same property which was done independently.

[163] Whilst there is such a thing as coincidence, when a series of events happened with such uncanny closeness to one another, we are permitted to

have our doubts as to the genuineness of the SPA that appears more to be a facade to facilitate illegal moneylending.

[164] The first plaintiff narrated that they were attended to by one Malay staff and one Chinese staff by the name of one Miss Liew of the legal firm. No lawyers were present to give advice to the plaintiffs on the terms and conditions of the so-called agreement. No details were entered into the agreement nor was any explanation made by the staff of D2. The plaintiffs said they did not understand the terms of the agreement signed and were informed that the agreement is a loan agreement.

[165] The third plaintiff had later applied for a loan to repay the said loan taken from Marcus and that was when the bank informed him that there was a caveat on the property lodged by LLT.

[166] The plaintiffs were later to be served with a notice of demand from D1's solicitors in July 2015. Horror of horrors, they were more than shocked when they learned from the notice of demand that D1 had fully paid the purchase price for the property now registered in his name!

[167] The plaintiffs sought an explanation from D2 but no explanation was forthcoming. The plaintiffs said they were not given a copy of the documents and agreement that they signed which they now discovered that it was an SPA dated 5 December 2014 of their property for RM150,000.

[168] On 5 August 2015 D1 filed a claim at the Magistrate Court Johor Bahru vide Civil Suit No A72-159–08 of 2015 seeking delivery of vacant possession of the property and that the plaintiffs here had been unlawfully occupying the property.

[169] The plaintiffs commenced a civil suit in the Sessions Court Johor Bahru wherein they claimed against D1 there for the losses and damages to their goods for apparently their furniture, gas stove and sewing machine and food items were thrown on the roadside in an attempt by D1 to forcibly enter and take vacant possession of the property. The grills were dismantled and doors broken down and the house roof taken off too.

[170] We pause to observe that such an action would certainly have gone beyond the use of reasonable force to obtain vacant possession and more akin to high-handed actions of a loan sharks who would often combine embarrassment and intimidation to get what they want.

[171] Little wonder that Parliament in all its wisdom had enacted s 29B(1) of

the Moneylenders Act 1951 making it a criminal offence for a moneylender or anyone acting on his behalf to harass or intimidate a borrower or any member of the borrower's family and s 29B(5) further defined what 'causes hurt', 'harassment' and 'intimidation' mean.

[172] The plaintiffs brought an action in the Johor Bahru Sessions Court for damage to their goods and property in Civil Suit No JA-B52–20–10 of 2017. The first plaintiff also lodged a police report on 9 June 2015 and 11 June 2015 on the incidents when the forcible entry and destruction of their goods and property took place.

[173] Both the plaintiffs and D1 confirmed that they had never met before the trial and certainly not when the SPA was signed.

[174] As we have observed before it is quite common in illegal moneylending transactions for the solicitors involved to act only for the 'purchaser' with the 'vendor' left unrepresented and it is no different here.

[175] It is undisputed here that both the first and second plaintiffs are illiterates and were unable to understand the documents that they had signed.

[176] The plaintiffs further alleged that the purchase price was not fixed by the parties but instead was fixed by D1 through D2. There was no negotiation much less a discussion on the purchase price of the property.

[177] The plaintiffs said they were not advised that they have a right to separate representation by their own solicitors. There was of course a statutory declaration produced by D2 that the plaintiffs had signed an acknowledgment that they confirmed that they did not want to appoint their own solicitors. That is probably one of the many documents they were made to sign when they went to D2's office.

[178] When there is no separate representation and advice given and where two of the plaintiffs are illiterate and unaware of their rights, we would find manifestation of unconscionable terms such as in cl 16 when for default of the vendors, there is exacted not just a full refund of all monies paid but also an agreed liquidated damages of another RM150,000 as stated in section 13 of the Schedule to the SPA!

[179] The plaintiffs' stand was that they had never agreed to sell their property to D1 and they had understood that they were signing a loan agreement.

[180] Learned counsel for the plaintiffs argued that the learned High Court judicial commissioner ('JC') had failed to sufficiently appreciate the evidence led that D1 had been involved in a series of cases filed before the courts suggesting very strongly his involvement in illegal moneylending transactions.

[181] Learned counsel for the plaintiffs highlighted that the trial judge seemed to be under the impression that the plaintiffs could not pay anything at all for the loan taken at para 26 of the learned JC's grounds of judgment ('GOJ') as follows:

> There was also no suggestion at all as to what the Plaintiffs were able, willing or prepared to pay. It would seem that they were unable to pay anything.

[182] It would appear that the learned JC was saying in effect that the ends justify the means in that the plaintiffs cannot pay the loan taken anyway. That is not just a simplistic approach but fraught with serious consequences if the loan taken does not comply with the provisions of the Moneylenders Act 1951 and D1 is unlicensed and there is no evidence that he is licensed under the Moneylenders Act 1951. We are further fortified in our conclusion when in para 27 of his GOJ he commented as follows:

> Whether or not the documents signed were intended to be a loan or a sale and purchase arrangement would appear to matter very little.

[183] We agree with learned counsel for the plaintiffs that the learned JC had misdirected himself in taking that approach as, if it is a loan agreement as the plaintiffs understood it is, then the provisions of the Moneylenders Act 1951 would by default, presume to apply, since it is not disputed that interest was chargeable on the amount borrowed.

[184] It is not for the learned JC to rationalise that D1 was merely 'exercising default provisions under the Loan Agreement'. We must say here that if it is a loan agreement then it cannot be at the same time an SPA and certainly not a mode of security for a loan which security must of necessity take the form of a charge or a lien-holders caveat by the lender under the NLC which provisions are exclusive and exhaustive with respect to the remedies available with the necessary safeguards for a borrower being built into the statutory provisions and protection. See *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, a decision of the Supreme Court.

[185] The learned JC lamented in para 27 of his GOJ that as the plaintiffs were not able to repay the loan it does not quite matter whether it is by way of they being dispossessed of their property in a transfer of it to D1 or the property

being sold by exercising the default provisions under the loan agreement; it is all 'a cruel manifestation of reality, but that is the way it is'.

[186] The resignation of the learned JC to what he deemed as the inevitable consequence of the plaintiffs' default failed to take into consideration that the Moneylenders Act 1951 had been passed by Parliament to protect vulnerable borrowers with no bargaining power from being oppressed and exploited by unscrupulous illegal moneylenders who would decide what price to fix for the property that would change hands if the loan is not repaid, in the process making a windfall at the expense of the borrower.

[187] The facade of an SPA would have to be discarded and dismantled so that what is fabricated and false would fall and the court must scrutinise whether the entire circumstances of the case and the conduct of the parties to see if they support the fact that the SPA prepared was a sham, designed to circumvent the law and in this case that of the prohibition of illegal moneylending where exorbitant interest is charged and the borrowers being at the mercy of the lender, might well end up like in this case and the Tan Bok Eng's appeal, losing their property.

[188] With the greatest of respect the learned JC misapprehended the evidence before him in relation to the factual matrix characteristics of illegal moneylending when he took the view that 'who had paid and whether the payment had appeared to have been made by a third party is not relevant.'

[189] Whilst that may not be relevant for an ordinary sale and purchase agreement, it is highly relevant especially when the one who procured the payment from one Tan Weng Giap does not appear in court nor the said Tan Weng Giap and D1 could not explain the connection.

[190] If the said Marcus and Tan Weng Giap were totally unrelated to LLT, we would have expected LLT to have paid the purchase price by way of withdrawing the full sum of RM150,000 from somewhere and paid into the clients' account of D2's legal firm. Instead what we have is another letter prepared by D2's legal firm where the plaintiffs signed on it confirming they had received the full payment of RM150,000 upon signing the SPA. This of course is a convenient method of evidencing the full receipt of the full purchase price paid in cash with no supporting documents as to whether the said sum had been paid into D2's clients' account first or that the payment was in the form of a bank draft.

[191] The query raised is reasonable because it is pitted against the plaintiffs' version that RM103,000 was paid to Siva's solicitors Messrs John Ang & Guna for the loan taken and upon payment the lien-holder's caveat was removed and

A indeed the land search confirmed the said removal of the lien-holder's caveat and there are correspondence between none other than Messrs Wee Woon Yuen & Partners and Messrs John Ang & Guna dated 15 December 2014 and 23 December 2014 confirming the receipt of RM103,000 and the removal of the lien-holder's caveat at pp 1453–1457 of the appeal record.

B

[192] The probability of LLT buying the same property soon after that on 5 December 2014 with his private caveat lodged to protect his interest on 11 December 2014 in what is painted as unrelated transactions, may be likened to striking the jackpot twice within the same month!

C

[193] It is against such improbabilities of a coincidence that it is reasonable to ask for the empirical evidence showing payment in full in one go by LLT for the purchase of the property for RM150,000 and such evidence had not been forthcoming.

D

[194] It becomes more imperative when Messrs Woon Wee Yuen & Partners wrote to Messrs John Ang & Guna enclosing the RHB demand draft No 003533 for RM103,000 bought by Tan Weng Giap on the latter's undertaking to withdraw the lien-holder's caveat and to deliver the original issue document of title to the property to them.

E

[195] Surely after parting with RM103,000 there must be a need for some security generally in the form of a charge or lien-holder's caveat but instead we are asked to believe that, unconnected and oblivious to what had happened, LLT walked into the office of D2 to sign an SPA dated 5 December 2014 and paid cash RM150,000 for the purchase upon signing the SPA! It just does not compute and we must be pardoned for feeling most uncomfortable about the transaction being a genuine SPA.

F

G

[196] We are further disturbed by the fact that though the consideration for the SPA is stated to be RM150,000 yet the notice of assessment of ad valorem stamp duty dated 25 January 2015 showed that the government's valuation revealed a market value of RM240,000 as shown at p 1464 of the appeal record. It lends support to the plaintiff's assertion that the purchase price was unilaterally fixed by LLT.

H

[197] Having heard this appeal after the Tan Bok Eng's appeal we are struck by the closeness of dates of the SPA between TBE and LLT being 17 December 2014 for a purchase price of RM260,000 when the government's valuation was RM380,000 and the present SPA dated 5 December 2014 for RM150,000 when the government's valuation showed RM240,000.

I

[198] If there is a skill in spotting good buys within so short a time, many

would be keen to acquire such an acumen. It is more likely a flexing of strong muscles where the borrower is not supposed to ask too much when it comes to the purchase price that the lender would simply decide in the lender's favour.

[199] Where the plaintiffs here advanced the argument that the SPA was a sham, masquerading as one when its mission was to mask a loan agreement, the trial judge must scrutinise the evidence adduced and to see if there are unusual features of the SPA that would lend support to the allegation, bearing in mind that illegal moneylenders would endeavour to leave no document trail behind so that their tracks are completely covered with no traces of moneylending activities.

[200] There is also the issue of res judicata raised in that the magistrate court in Civil Suit A72-159–08 of 2015 had granted a vacant possession order to LLT in his summary judgment applied for against Pushpavalli and her siblings and there has been no appeal against such an order and subsequently a wrote of possession had been issued.

[201] The proper forum before whom the parties had gone for resolving the core and central issue was the High Court in Johor Bahru where the plaintiffs in Pushpavalli and her two siblings had brought the action declaring the transfer of their property to LLT to be unlawful and void and for a cancellation of the transfer as well as the return of the title to them.

[202] LLT had also there claimed for damages arising out of loss of use of the property since he became the registered owner on 24 February 2015 and for the removal of the caveat lodged by the first plaintiff on 29 November 2015. By so doing the parties had agreed to the High Court resolving the core and central issue as to whether the transfer of the land was right in law. That decision and subsequent appeals from there would be determinative and final and not the magistrate court's decision on the vacant possession order based on who is the current registered owner without considering the core and central issue of the legality of the transfer.

[203] LLT cannot launched a collateral attack on the plaintiffs via a vacant possession order from the magistrate court. The magistrate court did not decide on the core and central issue but only on the peripheral issue as to a registered owner's right to have vacant possession of the property. Res judicata can only be successfully and properly invoked if the subject matter or issue has been 'necessarily and with precision' determined between the parties. See *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 affirmed by the Privy Council in *Tong Lee Hua v Lee Yoke San* [1981] 1 MLJ 54.

[204] We must add that it must first be established that the finding was a 'necessary step' for the determination of the whole case or a 'matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision': see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2), Rayner and Keeler Ltd v Courts* [1967] 1 AC 853 at p 965. This principle as succinctly set out in Spencer Bower, Turner and Handley on the *Doctrine of Res Judicata* (Butterworth, 3rd Ed, 1996) which was cited with approval by the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2005] 3 SLR 157; [2005] 3 SLR(R) 157 as follows:

> Even when the court has expressly determined the same issue in the earlier proceeding an issue estoppel will not necessarily result. Only determinations which are necessary to the decision, and fundamental to it, will found an issue estoppel. Other determinations, however positive, cannot.

[205] It was the High Court that dealt comprehensively and precisely with the core and central issue of the legality of the transfer and if the transfer is unlawful, fraudulent and the instrument of transfer void, then the edifice of LLT's claim would fall as well. Therefore, when this court decides on an appeal from the High Court that the transfer to LLT is unlawful then the magistrate court order falls with it.

[206] We cannot see how a magistrate court's decision on summary judgment can impair or impede the decision of the High Court and with that the appeal to this court in the circumstances of this case.

[207] We are ever mindful of the fact that the doctrine of res judicata is designed to achieve justice and where its application would yield an unjust result it should not be applied. See the case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 and the House of Lords case of *Arnold v National Westminster Bank plc* [1991] 2 AC 93 where at p 109 it was held that:

> One of the purposes of estoppel being to work justice between the parties, it is open to the courts to recognise that in special circumstances inflexible application of it may have the opposite result ...

[208] The plaintiffs may want to apply for the magistrate court's order to be vacated and indeed any writ of possession issued would have to be stayed upon an application by the plaintiffs.

[209] We are more than satisfied on the balance of probabilities that the transaction in the SPA is a sham designed to distract the enforcement authorities and to deceive the plaintiffs as borrowers to part with their property

with no protection that comes with a judicial sale by way of public auction as provided for in the NLC for securities over land. A

PRINCIPLES

Whether the trial court is confined to the four corners of the sale and purchase agreements and related documents in determining the true nature of the transaction B

[210] In *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd* [2020] 6 MLJ 333 the Court of Appeal observed as follows in the context of an illegal moneylending transaction masquerading as an SPA: C

> [99] A sham agreement is slimily resorted to in creating a smoke screen to shield the real transaction from surfacing for the eyes of the authorities to scrutinise and sanction. Often it has less than an honourable purpose for otherwise why a sham. It is a device to divert and direct an observer the other way, if not to distract him from being detained by what is real, and often less palatable if not downright perverse! It is as old as mankind and after all there is nothing new under the sun but accepting always that sunlight is the best disinfectant and the electric light the best policeman. D
>
> [100] Often times the weaker party has no choice but to agree to signing the documents prescribed by the stronger party who is in a position to dictate. Though initially starting off as documents that the parties would not act on as in both sides understand that it would not be used, its dark side is that when the stronger controlling party renege on it, it can be abused to serve a nefarious end. E
>
> [101] In the House of Lords' case of *AG Securities v Vaughan & Ors* [1990] 1 AC 417 Lord Justice Bingham explained a 'sham agreement' as follows: F
>
> > A written agreement is a sham where it incorporates clauses by which neither party intends to be bound and which is obviously a smoke screen to cover the real intentions of both contracting parties: *Hadjiloucas v Crean* [1987] 3 All ER 1008, 1014, per Purchas LJ. The accepted definition of a sham is that given by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802: G
> >
> > As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, *it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.* But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* (1882) 21 Ch D 309, CA and *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. H I

A [102] Put simply, a sham exists where the parties say one thing intending another: *Donald v Baldwyn* [1953] NZLR 313, 321, per FB Adams J.

[103] In a world of genuine imitation, it is often not easy to discern a sham from what it really is in substance for those bent on perfecting the art of deception would try their level best to leave behind no trace.

B

[104] We therefore, with the greatest of respect to the learned trial Judge, cannot accept his lament that if it really was a moneylending transaction then ironically there were no documents on the loan agreement and nothing showing the amount of the loan and the repayment and interest. See paragraph [33] of the Grounds of Judgment of the High Court. (Emphasis added.)

C

[211] It therefore behooves the trial court, when there is the allegation that the agreement is a sham and a fabrication with the object of circumventing the law, to examine the external evidence to see if the pieces in the puzzle would fit to D from a coherent whole. The court must probe further to see if there are unusual features in the agreement as in here, a sale and purchase agreement and examine the circumstantial evidence such as the conduct of the parties that may arouse suspicion if not setting off the alarm bell.

E **[212]** Precisely because of the difficulty in discerning the differences that would distinguish the real from the fake, the UK Court of Appeal in *Hitch and others v Stone (Inspector of Taxes)* [2001] STC 214 referred to the *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, and laid down the applicable test to sniff and smoke out a sham document as follows:

F

[64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.

[65] First, in the case of a document, the court is not restricted to examining the four comers of the document. *It may examine external evidence*. This will include the G parties' explanations and *circumstantial evidence* such as evidence of the *subsequent conduct of the parties.*

[66] Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must H have intended to give a false impression of those rights and obligations to third parties.

[[67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. *A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and* I *a situation where they intend some other arrangement to bind them.* In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

[68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and

binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied (see for example *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1966] 1 QB 650 at 683–684 per Diplock LJ, which was cited by Mr Price).

[[69] Fifth, the intention must be a common intention (see *Snook*) ... (Emphasis added.)

[213] The above test was followed by our Court of Appeal in *Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] MLJU 1552 where Justice Abang Iskandar JCA (now CJSS) observed as follows:

[46] It had been observed that the policy considerations that underpin the concept of sham are the protection of the rule of law, to prevent abuse of fundamental legal principles and the prevention of evasion of statutes, among others. It was also commented that the *Snook* case [supra] had narrowed down the test for sham. See the relatively recent case of *Autoclenz Ltd v Belcher* [2011] UKSC 41, a landmark case in the UK on labour law and contract law; and the related article by Toby Graham, appearing in *Trusts and Trustees,* Volume 22, Issue 8, October 2016. Indeed, on the authority of the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd v Arab Malaysian Prima Realty Sdn Bhd* [2001] 1 MLJ 324, *the courts are entitled to go behind the impugned agreement or transaction to ascertain the true nature of such agreement or transaction*. In the case of *Lori Malaysia Bhd v Arab Malayasian Finance Bhd* [1999] 2 CLJ 997, it was there observed by our apex court that in other Common Law countries, courts were slow to declare commercial contracts as void on ground of illegality, but having said that if the circumstances so warrant, the courts would not shy away, from doing what would be in accord with what the law expects to be done, as a keeper of the public conscience. The fact that the apex court had done that could be seen in the recent case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 FC, among others. (Emphasis added.)

[214] The court in scrutinising the transaction is duty bound to shine the search light of consistency and coherence and to see if there are contradictions that cry out for an explanation.

[215] No one factor is conclusive but if when taken together more questions are raised than there are satisfying answers, then in all probabilities the agreement is a sham and fabrication to camouflage and counterfeit the real transaction, which if allowed would contravene the law. The dressing up and decoy is deliberately if not delicately designed to escape detection by the enforcement authority and to deceive the weaker party when the crunch comes. The 'deal' is structured in such a way that the substance is shielded from detection.

[216] It is against that backdrop that this court had weighed in on the evidence of suspicious circumstances and unusual features, the tell-tale signs

A and the indicia for dismantling and discarding the facade and exposing the transaction for what it really is — an illegal moneylending transaction.

B **[217]** The following are some of the suspicious circumstances and unusual features that would justify a further probing as pointing in the direction of a sham agreement like an SPA masking the illegal moneylending transaction:

(a) the borrower 'vendor' is directed to use the services of a solicitor acting for the lender 'purchaser' with no separate representation;

C (b) some directions to make repayments into designated accounts unrelated to the SPA;

(c) the borrower 'vendor' is made to sign a slew of documents all in one go and often not given a copy;

D (d) the purchase price is fixed by the lender 'purchaser' and commonly well below market price as reflected in the government stamp duty assessment;

(e) an unusually large amount of cash deposited and sometimes in many small denominations which source the lender 'purchaser' has difficulty explaining;

E

(f) the borrower 'vendor' not being kept posted as to the progress of the transaction and often realised it when it is too late that the property has been transferred into the name of a third party that he had never met before;

F

(g) the unusually high deposit paid of more than 10% of the purchase price and sometimes even the whole of the purchase price paid upon signing the SPA;

G (h) the unusually long period of time, sometime as long as one year, for the lender 'purchaser' to complete the purchase when the purchase price is already below market value;

(i) the lender 'purchaser's' caveat may not be lodged until there is manifestation of objection by the borrower 'vendor' to the transfer; and

H

(j) the rather common acts of harassment and criminal intimidation when the borrower 'vendor' refuses to grant vacant possession because he had never intended to sell his property.

I

[218] The above list is by no means exhaustive and there will be doubtless variations of it and so one would have to look for the similarities in the differences and well as the differences in the similarities as human ingenuity knows no bound.

Whether ss 91–92 of the Evidence Act 1950 would prevent the court from going beyond the agreement and related documents signed

[219] Section 91 of the Evidence Act 1950 reads:

> 91 Evidence of terms of contracts, grants and other dispositions of property reduced to form of document
>
> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[220] Section 92 of the Evidence Act 1950 provides as follows:

> 92 Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms: ...

[221] The learned judge and JC had misconceived the provision of ss 91–92 of the Evidence Act 1950 as prohibiting evidence to be given to contradict the express terms of the SPA which prohibition in the rule against parol evidence does not apply when the allegation is that the agreement relied on is a facade to fool the uninitiated and the simpletons as was held in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; [2001] 1 CLJ 779 where the court adopted the approach of the Indian Supreme Court in *Gangabai w/o Rambilas Gilda v Chhabubai w/o Pukharajji Gandhi* AIR 1982 SC 20, and clarified as follows:

> In my judgment, s 92 of the Evidence Act had nothing whatever to do with this case. The judge was in error when he thought that it did. *The appellants were not seeking to admit evidence to contradict the terms that had been entered into. They wanted the court to see the real transaction behind the facade of the agreements*. That this is permissible is settled by high authority. I will not go through all the cases here. Suffice that I mention just one. (Emphasis added.)

[222] In *Pannir Selvam a/l Sinnaiyah & Anor v Tan Chia Foo & Ors* [2019] MLJU 1699, a case where the argument of a sham agreement in the form of a sale and purchase agreement asking the underlying illegal moneylending agreement was upheld, Evrol Mariette Peters JC analysed the issue as follows:

A [26] In my view, reliance on the parol evidence rule by the first defendant is misconceived, as the plaintiffs are not denying that they signed all the documents in question. The oral evidence by the plaintiffs in court was not for the purpose of contradicting, varying, adding to or subtracting the terms of the agreement, but to explain that these documents were a façade to an illegal moneylending scheme.

B [27] The argument of counsel for the first defendant is, therefore, misconceived, as the oral evidence of the first plaintiff was not caught by the exclusion of parol evidence rule, as envisaged by ss 91 and 92 of the Evidence Act.

[28] Furthermore, it is trite law that section 92 *presupposes the validity of the* C *transaction evidenced by the document. If the validity of the transaction is in question, and if it is being disputed, then the Court is not bound by what has been described as the paper expression of the parties*. (Emphasis added.)

[223] *Sarkar's Law of Evidence* (LexisNexis, Malaysian Ed Vol 11) at p 2212 is D clear on the non-applicability of s 92 of the Evidence Act as follows with respect to sham agreements:

Section 92 does not preclude a party from showing that the writing was not really the contract between the parties, but was only fictitious or colourable device which cloaked something else ... *Oral evidence is admissible to show that it was only a sham* E *or nominal transaction and was not intended to be acted upon*, or to show that a written for the conveyance of property was only a fictitious sale to avoid execution proceedings against the property, or that a certain receipt is fictitious in the sense that no money was paid. (Emphasis added.)

F **[224]** The learned trial judge and JC both fell into error and misdirected themselves when they felt constrained by the terms of the SPA and related documents and in the process, in the name of certainty, felt that they must give effect to it, leading them to allow specific performance or to uphold the transfer and allow vacant possession as the case may be. G

[225] Such a misdirection in law would give illegal moneylenders a field day as they would glory in the fact that the court would not go behind the impugned agreements to ascertain its true nature.

H **[226]** The law is not powerless as to wring its arms in despair but rather it is versatile to verify the true deeds of fallen human nature that had slipped into the dark side of oppression and exploitation of the most unconscionable kind and to vindicate the vulnerable whose rights had been violated.

I *Whether the SPAs and related documents are unenforceable, being illegal moneylending transactions and that the transfer effected is fraudulent and not indefeasible*

[227] It is not disputed that Li Chee Loong in Mahmood's appeal and Lim Len Tat in Tan Bok Eng's appeal and Pusphavalli's appeal are unlicensed moneylender and the agreements in the SPAs are unenforceable as s 15 of the Act declares as follows:

> 15 Contract by unlicensed moneylender unenforceable
>
> *No moneylending agreement* in respect of money lent after the coming into force of this Act by an *unlicensed moneylender shall be enforceable.* (Emphasis added.)

[228] From the evidence adduced the borrowers had proved that interest had been charged and a very exorbitant one at that such that they could not continue paying anymore. The interest alone was enough to 'kill' them and whatever payment made is like throwing money into a bottomless pit. Section 2 of the Moneylenders Act 1951 defines 'moneylending' to mean 'the lending of money at interest, with or without security, by a moneylender to a borrower'.

[229] The definition of 'moneylender' is as follows:

> 'moneylender' means any person who *carries on* or advertises or announces himself or holds himself out in any way as carrying on *the business of moneylending*, whether or not he carries on any other business; (Emphasis added.)

[230] It is not open to Li Chee Loong and Lim Len Tat to say they are not moneylenders and indeed they did not say that because the position taken by them was that it was a straight forward SPA. At any rate even a single loan at interest is enough to raise the presumption of that person carrying on the business of moneylending under the amendment effected by the Moneylenders (Amendment) Act 2011 which came into force on 15 April 2011. It introduced s 10OA which according to the Explanatory Statement to the Bill, seeks to facilitate the proof of business of moneylending. Section 10OA makes it even more difficult for a lender who had charged interest on the loan given to say it was a one off transaction by allowing a legal presumption to be drawn against the lender as follows:

> 10OA Presumption as to the business of moneylending
>
> Where in any proceedings against any person, it is alleged that such person is a moneylender, *the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending,* until the contrary is proved. (Emphasis added.)

[231] Here from the evidence adduced at trial Li Chee Loong had been involved not just in Mahmood's Appeal herein as an unlicensed moneylender but also in Civil Suit No 22NCvC-138–08 of 2015 in the Johor Bahru High Court which was reported in *Ngai Fong Lan (P) & Anor v Li Chee Loong* [2018]

MLJU 1518 and which decision was affirmed on appeal to the Court of Appeal on the finding that the SPA there was a sham and that the real transaction was that of an illegal moneylending transaction.

[232] Likewise from the evidence adduced at the trial, Lim Len Tat was an illegal moneylender in both the Tan Bok Eng's Appeal and Pushpavalli's appeal, not to mention two other cases referred to in the Johor Bahru High Court.

[233] The presumption of moneylender has not been rebutted.

[234] The unlicensed moneylender cannot under the guise of not being covered by the Moneylenders Act 1951 take shelter in the freedom of contract in that parties can create contractual obligations not prohibited by the Act. The moment a court of law makes a finding that the transaction is moneylending and the fact that the lender is not licensed to lend with interest that makes the whole agreement no matter how it is structured, into an illegal moneylending agreement which is unenforceable under s 15 of the Moneylenders Act 1951.

[235] The device of a sale and purchase agreement and a memorandum of transfer duly signed as security for a loan with interest charged is clearly to circumvent the provisions of the Moneylenders Act 1951 designed to protect the borrower from being exploited.

[236] As stated in *Global Globe* the securities recognised under the NLC are charges, lien-holders caveats and even equitable mortgage and the courts have also recognised contract of sale in a *jual-janji* agreement and there are strict statutory protection when it comes to a judicial order for sale in a public auction as well as the steps leading to it. It was observed as follows:

> [153] The protection afforded by a charge or a lien is that a proper application for an order for sale under the NLC have to be proceeded with to realise the security with the need to apply to the High Court in case of a registry title and the need to exhibit the necessary current valuation report of the Property charged for the purpose of fixing the reserve price at the public auction. All these to be preceded by the service of a notice to remedy the breach as prescribed under the NLC and with the implementation now of *e-lelong* there is a further enhancement to the integrity of the public auction system where only those genuinely interested to bid may do so.

[237] The transaction is illegal as it is clearly forbidden under the Moneylenders Act 1951 and further if allowed, would defeat the purpose of the law. It would also be against public policy. The transaction is caught by s 24(a), (b), (c) and (e) of the Contracts Act 1950 that provides as follows:

> 24 What considerations and objects are lawful, and what not The consideration or object of an agreement is lawful, unless —

(a) it is *forbidden by a law*;

(b) it is of such a nature that, if permitted, it *would defeat any law*;

(c) it is *fraudulent*;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or *opposed to public policy.*

In each of the above cases, the consideration or object of an agreement is said to be unlawful. *Every agreement of which the object or consideration is unlawful is void.* (Emphasis added.)

[238] What then is the effect of a transfer that arises from a void SPA. The transfer cannot but be void as the consideration is unlawful.

[239] Not only that, the transfer is also fraud on the borrowers for they had never intended to transfer their properties at those so-called agreed purchase price. Though they were ignorant of their legal rights, the law even in a case of a licensed moneylending would require the relevant securities to be in the form of a charge or a lien-holder's caveat where the lender must apply to court for an order for sale after serving the relevant statutory notice and where the conditions of sale in the proclamation of sale have to be approved by the court before an auction sale is permitted under the supervision of the court with a licensed auctioneer being appointed and the borrower allowed to tender the amount owing before the auction. There is the added protection of the reserve price being fixed only after a valuation report has been submitted.

[240] The SPAs and the instruments of transfer were fraudulently procured to deprive the borrowers of their land without following the means allowed by the law even assuming that the lenders were licensed moneylenders, which they are not. The lenders were fully aware what they were up against and so they went to great lengths to disguise the transactions as a foolproof SPA but alas they all had difficulties explaining the unusual features discussed above and to allay the suspicion raised.

[241] In *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 Jeffrey Tan FCJ had dealt with the nefarious manifestations of fraud as follows:

What amounts to 'fraud'? 'It is not easy to give a definition of what constitutes fraud in the extensive signification in which the term is understood by Civil Courts of Justice. The courts have always avoided hampering themselves by defining or laying down as a general proposition what shall constitute fraud. Fraud is infinite in variety (*Reddaway & Co and Another v Banham & Co and Another* [1896] AC 199 at p 221). The fertility of man's invention in devising new schemes of fraud is so great,

> that the courts have always declined to define it, or to define undue influence, which is one of the many varieties, reserving to themselves the liberty to deal with it under whatever form it may present itself (*AIIcard v Skinner* (1887) 36 Ch D 145 at p 183). Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (Story, Eq Jur 187). All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered fraud (Finch 439). Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to (*Green v Nixon* (1857) 23 Beav 530 at p 535)' (Kerr on *Fraud and Mistake* (7th Ed) at p 1). 'The concept of fraud is notoriously difficult to define' (*Cavell USA Inc and another v Seaton Insurance Company and another* [2009] EWCA Civ 1363 per Longmore LJ, Mummery and Toulson LJJ in agreement). We would not hazard to define 'fraud'. We would just say that 'fraud' is a generic term which also covers all manner of cheat. Deceit and dishonesty.

[242] In *Dadourian Group International Inc and others v Simms and others* [2009] EWCA Civ 169 Lady Justice Arden appreciates the need to draw relevant inferences of fraud against the totality of the evidence adduced as follows:

> At times he came close to suggesting that fraud can only be established where there is direct evidence. If that were the case, few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing. Frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from the primary facts.

[243] Likewise in *Yee Poh Nyen v Raji bin Kasan & Ors* [2018] MLJU 1108 Tengku Maimun JCA (now CJ) held that the law does not require direct evidence, but recognises that frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from primary facts. Her Ladyship opined as follows:

> Fraud in actions seeking to affect a registered title means actual fraud or dishonesty of some sort and not what is called constructive or equitable fraud (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81). Whether fraud exist is a question of fact which is to be determined in the light of the facts and circumstances surrounding each particular case (see *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 137; *Suratmin Othman v Yusof Omar & Ors* [1988] 2 CLJ Supp 380). Fraud may occur where the designed object of a transfer is to cheat a person of any existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196).

[244] We have no doubt that the lenders in all these three appeals were trying a pull a fast one and if need be, to even pull the wool over the trial judges' eyes such that from the pure perspective of looking at the SPAs and the related documents, the transactions would at first blush appear unassailable. These were craftily and clandestinely designed to deceive and distract so as to escape detection of anything sinister behind the surface of respectability.

[245] To allow unlicensed moneylender to effect a transfer of the lender's property on account of money lent would be against public policy; it would be allowing unlicensed moneylender the room to oppress and exploit borrowers when even licensed ones have a host of provisions to comply with under the Moneylenders Act 1951 and the restrictions on the interest that may be charged. Under s 17A(1) of the Act it is provided as follows:

> 17A (1) For the purposes of this Act, the interest for a secured loan shall not exceed twelve per centum per annum and the interest for an unsecured loan shall not exceed eighteen per centum per annum.
>
> (2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a moneylender of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.
>
> (3) Where in a moneylending agreement *the interest charged* for a secured loan or an unsecured loan, as the case may be, *is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.*
>
> (4) Any moneylender who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both. (Emphasis added.)

[246] It would be to allow unlicensed moneylenders to operate without any restrictions, restrain and regulation and that can only open the floodgates of foul practices and indeed there would be no incentive for licensed ones to follow the law. Indeed, it would be more profitable to have the front end of their shop doing licensed moneylending transactions and the back end, hidden away from the eyes of the authorities, doing unlicensed ones! Public policy can be gathered from the prohibitions against even licensed moneylending transactions for practices not in compliance with the Act and the ever stricter penalties introduced by the last two amendments in the Moneylenders (Amendment) Act 2003 and the Moneylenders (Amendment) Act 2011 as well as the presumption as to moneylending even for one transaction under the Moneylenders (Amendment) Act 2011.

[247] In fact the 2003 introduced a new s 10P that reads:

> 10P Moneylender and borrower must enter into a moneylending agreement

A (1) A moneylender who intends to lend money to a borrower shall enter into a *moneylending agreement with the borrower, and that agreement shall be in the prescribed form.*

(2) Any moneylender who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment.

(3) Any *moneylending agreement which does not comply with the prescribed form shall be void and have no effect and shall not be enforceable*. (Emphasis added.)

[248] It is thus clear that even if there is no intention to enter into a sham agreement, once it is held that the lender is a moneylender, and an unlicensed one at that, the moneylending agreement must be in the prescribed form and certainly not in the form of an SPA and security in the form of an instrument of transfer in Form 14A under the NLC duly signed with the consideration stated as the so-called purchase price.

[249] This flows from a reading of the definition of 'moneylender' and 'moneylending' in s 2 of the Act which reads:

'moneylender' means *any person who carries on* or advertises or announces himself or *holds himself out in any way as carrying on the business of moneylending*, whether or not he carries on any other business;

'moneylending' means the *lending of money at interest*, with or without security, by a moneylender to a borrower;

[250] If the moneylender lends without a license, as in the appeals before us, then it is additional a criminal offence as provided for under s 5 of the Moneylenders Act 1951 as follows:

5 Licence to be taken out by moneylender

(1) *No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act.*

(2) Any person carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending without a valid licence, or who continues to carry on such business after his licence has expired or been suspended or revoked shall be guilty of an offence under this Act and shall be liable to a fine of not less than two hundred and fifty thousand ringgit but not more than one million ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment. (Emphasis added.)

[251] The fines have been increased from not less than RM20,000 to RM250,000 and from not more than RM100,000 to RM1m, reflecting the public policy that undergirds the amendments.

[252] Any transfer obtained by such deceitful and dubious means is not only fraudulent but for an unlawful purpose and void and such a transfer is defeasible and the court on being satisfied of proof on a balance of probabilities shall set aside and cancel such a transfer with the effect that the title shall revert to the borrower as the previous registered owner of the property.

[253] The moneylending agreement masquerading and masking as an SPA is void both under s 24 of the Contracts Act 1950 and the various provisions of the Moneylenders Act 1951 and in particular s 15 referred to above. The Form 14A as an instrument of transfer under the NLC that arises out of the void and unenforceable agreement is also void. See the Federal Court case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1.

[254] Section 340(1) and (2) of the NLC provides the circumstances under which any immediate transfer of land shall not be indefeasible as follows:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The *title* or interest of any such person or body *shall not be indefeasible*
>
> (a) in cases of *fraud* or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where *registration was obtained* by forgery, or *by means of* an insufficient or *void instrument*; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. (Emphasis added.)

[255] In *Tenure and Land Dealings in the Malay States* by David SY Wong, at p 364 the learned author explained the meaning and scope of 'insufficient or void instrument' for the purpose of s 340(2)(b) of the NLC as follows:

> (iv) 'Insufficient or void instrument'
>
> Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained 'by means of an insufficient or void instrument'. Unlike 'forgery', the expression 'insufficient or void instrument' is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be regarded by the court as 'insufficient' or 'void'. Some general observations may indicate how wide its domain may be. The reference to the

A insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. *Where the instrument is executed in pursuance of a contract of dealing, the invalidity of contract (ie where the contract is void) would plainly entail that the instrument is void accordingly.* The instrument may also be 'insufficient' or 'void' for reasons relating to the B capacity of the parties concerned, or by reason of some formal defect or irregularity. In addition, *non-compliance with relevant statutory requirements may also result in the instrument being regarded as 'insufficient' or 'void'*. (Emphasis added.)

C **[256]** The transfers and titles of the lender in Lim Len Tat are clearly and indisputably void and must be set aside and cancelled with the effect of the titles in Tan Bok Eng's appeal and Pushpavalli's appeal reverting to its original owners.

D *Whether this court should order restitution in that there would be unjust enrichment if even the balance principal sum is not repaid*

E **[257]** To begin with the lenders had not pleaded this in their respective statement of claims. We cannot give a relief not pleaded especially when the case was not fought on the alternative plea that if it is a moneylending transaction then the court should grant judgment for the principal balance sum not paid.

F **[258]** Parties are bound by their pleadings and they cannot approbate and reprobate. See *Samuel Naik*'s case. Having gone for broke as it were in confidently asserting that it was a sale and purchase transaction, it is then too late to now want to claw back on the high moral ground of unjust enrichment.

G **[259]** In the Singapore Court of Appeal's case of *Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another* [2018] 1 SLR 363; [2018] SGCA 5 where a specially convened panel of five Judges of Appeal sat to deliberate on this same issue in the light of *Patel v Mirza* [2017] AC 467 watershed decision by the UK Supreme Court on illegality and restitution, the lender there had pleaded in the alternative a repayment of the H balance principal sum not paid and the Court of Appeal had dismissed that, affirming the decision of the High Court that the joint venture investment agreement was null and void and unenforceable under the Singapore Moneylenders Act.

I **[260]** At any rate we have given careful consideration to this plea though not pleaded in the statement of claim of the lenders and we are of the view that to allow restitution would be to allow the lenders to mock the law prohibiting illegal moneylending under the Moneylenders Act 1951.

[261] It would embolden the illegal moneylenders or 'alongs' as they are pejoratively stigmatised, giving them a gush of wind beneath their wings that they may fly higher with their newfangled and fraudulent schemes structured to look regular and respectable.

[262] We can almost hear them rejoicing with glee with the refrain, 'catch me if you can' and 'even if you can I'll still get back the balance principal loan!' It would be to give the *alongs* the best of both worlds and the public policy as reflected in the ever increasing fines and penalties and the greater powers given to the police to investigate and collect evidence would be stymied and stultified in the Moneylenders (Amendment) Act 2003 and the Moneylenders (Amendment) Act 2011.

[263] The majority in *Patel*'s case had propounded a 'range of factors' test as a defence to a claim in unjust enrichment. The minority seemed to suggest that restitution should always be available and that one should leave it to the criminal law to take care of the criminality aspect of the legislation. Our task is made easier by the clear words of s 15 of the Moneylenders Act 1951 which reads:

> 15 Contract by unlicensed moneylender unenforceable
>
> *No moneylending agreement* in respect of money lent after the coming into force of this Act by an *unlicensed moneylender shall be enforceable.* (Emphasis added.)

[264] Additionally any claim for restitution must also satisfy the requirement of s 66 of the Contracts Act 1950 which provides as follows:

> 66 Obligation of person who has received advantage under void agreement, or contract that becomes void
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[265] Here is a case where the lenders had carried out their illegal act to the end in the Tan Bock Eng's appeal and Pushpavalli's appeal where the property had been registered in the name of the lender or his nominee. It is not a case where the unlicensed moneylender was not aware of the illegality for otherwise he would not be engaged in such a convoluted transaction simmering beneath the thin veneer of respectability. It is a case where the agreements were void ab initio and not one where they become void subsequently or are discovered to be void. Section 66 of the Contracts Act 1950 is not available to illegal moneylenders or their nominees in Li Chee Loong and Lim Len Tat here in these appeals.

[266] It is not for nothing that the whole agreement is made unenforceable. The House of Lords in UK in *Boissevain v Weil* [1950] AC 327 had introduced the stultifying principle where to allow a claim in restitution upon a finding of illegality would be to indirectly allow an enforcement of an illegal loan, albeit severing the illegal interest element from the principal. Lord Radcliffe issued his disapproval at p 341 as follows:

> [I] this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. *A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it*. (Emphasis added.)

[267] *Boissevain*'s case was a claim based on a total failure of consideration for the recovery of a loan which had been made in violation of exchange control regulations under the Defences (Finance) Regulations 1939 (UK). The House or Lords was clear that to allow the claim would be to allow an indirect enforcement of an illegal loan.

[268] Indeed to allow even the lenders to claim the principal would be to stultify the public policy behind the Moneylenders Act 1951. It would be to negate all the efforts put in place by Parliament to try to contain the menace of illegal moneylending with its horror stories of being stripped bare to one's tunic.

[269] It is too late in the day to separate the good from the bad; it is a case where a 'little leaven leavens the whole lump' and that a contaminated fountain cannot pour forth both clear and brackish water. If the source is contaminated the spring and stream would be contaminated as well.

PRONOUNCEMENT

[270] We are more than satisfied that the transactions in the three appeals before us are illegal moneylending transactions disguised as sale and purchase transactions.

[271] We allowed all the three appeals and set aside the three respective judgments of the High Court.

[272] We allowed judgment to be entered for the appellant/defendant in Mahmood's appeal (Appeal 463) as prayed in prayer 17(a) and (b) at p 34 of the appeal record in the amended defence and counterclaim for a declaration that the SPA is null and void and unenforceable and that the caveat lodged by the respondent Li Chee Loong be removed and with agreed costs of RM10,000 to paid to the appellant subject to allocatur.

[273] We allowed judgment to be entered for appellant/plaintiff in Tan Bok Eng's appeal (Appeal 1603) in prayer 77(i)-(vi) of the statement of claim at pp 53–54 of the appeal record which includes a declaration that the SPA is null and void and unenforceable, that the transfer of the title of the plaintiff/appellant Tan Bok Eng to the first defendant/first respondent Lim Len Tat is unlawful and void, that the Registrar of Land Titles do give effect to this order of the court, that title to the property be returned by Lim Len Tat to Tan Bok Eng, that the transfer of the title to Lim Len Tat be set aside and cancelled and that vacant possession be given back by Lim Len Tat to Tan Bok Eng. We also ordered costs of RM10,000 to be paid to the plaintiff/appellant subject to allocatur.

[274] As for Pushpavalli's appeal (Appeal 2049) we allowed judgment to be entered for the appellant/plaintiff as per prayer 40(1)–(4) of the statement of claim at p 36 of the appeal record which includes a declaration that the SPA is null and void and unenforceable, that the title to the property be returned by the first defendant/first respondent Lim Len Tat to the plaintiffs/appellants, that the transfer of the title to the first defendant/first respondent be set aside and cancelled and that the Registrar of Land Titles do give effect to this order of the court.

[275] We also ordered costs of RM10,000 to paid to the appellant subject to allocatur.

Order accordingly.

Reported by Ashok Kumar